

No. 21-15667

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WILLIAM KIVETT, BERNARD BRAVO, and LISA BRAVO,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California, San Francisco Division
The Honorable William Alsup, District Judge
No. 3:18-cv-05131-WHA

PLAINTIFFS-APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD

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15 *and the certified Class*

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 WILLIAM KIVETT and BERNARD and LISA
20 BRAVO, individually, and on behalf of others
21 similarly situated,

22 Plaintiffs,

23 vs.

24 FLAGSTAR BANK, FSB, a federal savings bank,
25 and DOES 1-100, inclusive,

26 Defendant.

No. 3:18-CV-05131-WHA (DMR)

**DECLARATION OF PETER FREDMAN
IN SUPPORT OF PLAINTIFFS'
SUPPLEMENTAL BRIEF**

CLASS ACTION

Hearing Date: January 29, 2019
Time: 8:00 a.m.
Courtroom: 12, 19th Floor

Complaint Filed: August 22, 2018
FAC Filed: October 19, 2018

Honorable Judge William Alsup

I, Peter Fredman, do hereby declare as follows:

1. I am an attorney duly licensed to practice before all courts of the States of California and before this Court. I am co-counsel of record for Plaintiffs William Kivett, Lisa and Bernard Bravo, and the certified Class (collectively “Plaintiffs”) in the above-entitled action. I have personal knowledge of the matters stated herein and, if called to testify, I could and would competently testify thereto.

2. I submit this declaration in support of Plaintiffs’ Supplemental Brief Re Undisclosed Employee Declarations Submitted By Defendant Flagstar Bank, FSB In Cross-Motions For Summary Judgment (Per Amended Case Management Scheduling Order, (Dkt. No. 142, ¶ 2)) (the “Supplemental Brief”).

3. Attached hereto as Exhibit 1 is a true and correct copy of the Declaration of Courtney Chang filed in this action on December 19, 2019 as Dkt. No. 131-1.

4. Attached hereto as Exhibit 2 are true and correct excerpts from the transcript of the Deposition of Courtney Chang as cited in the Supplemental Brief.

5. Attached hereto as Exhibit 3 is a true and correct copy of the redacted version of the Declaration of Sean Mansell filed in this action on December 19, 2019 as Dkt. No. 131-2.

6. Attached hereto as Exhibit 4 are true and correct excerpts from the transcript of the Deposition of Sean Mansell as cited in the Supplemental Brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on January 24, 2020, in Berkeley, California.

/s/ Peter Fredman
PETER FREDMAN

I, THOMAS LOESER, am the ECF User whose ID and password are being used to file this document hereby attest that all signatories concur with this filing. /s/Thomas Loeser

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2020, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Thomas E. Loeser
THOMAS E. LOESER

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WILLIAM KIVETT, individually,
and on behalf of others
similarly situated,

Plaintiff,

-vs- Case No. 3:18-cv-05131-WHA (DMR)

FLAGSTAR BANK, FSB, a federal
savings bank, and DOES 1-1000,
inclusive,

Defendants.

_____ /

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THE DEPOSITION OF COURTNEY E. CHANG

Taken at 8800 Wickham Road

Romulus, Michigan

Commencing at 8:30 a.m.

Wednesday, January 15, 2020

Before Trisha Cameron, RDR, RMR, CRR, RPR, CSR

1 A. It was regarding the origination practices of certain
2 types of loans.

3 Q. Were you testifying as a corporate designee? Do you
4 know what that is?

5 A. I do not know what that is.

6 Q. So you don't know if you were testifying as a
7 corporate designee?

8 A. No.

9 Q. I'll go -- since that was a long time ago, I'll very
10 briefly go over the rules of depositions.

11 First of all, what's happening is we are
12 going to -- I'm going to examine you, interview you.
13 Everything we say is going to be transcribed by the
14 court reporter, and it's going to be used potentially
15 either in court trial or court proceedings as
16 evidence. Do you understand that?

17 A. Yes.

18 Q. So as a basic logistical matter, you've got to -- and
19 I have to try very hard to talk slowly, wait for the
20 other person to finish the question or answer before
21 the next question or answer comes. Do you understand
22 that?

23 A. Yes.

24 Q. And another thing is we have to communicate audibly
25 so that the court reporter can take it down. Do you

1 A. Yes.

2 Q. So if I were to ask you how many stairs I have in my
3 house, since you've never been in my house, you have
4 no way of answering that without speculating or
5 guessing. Do you understand?

6 A. Yes.

7 Q. I might not have a house, right? On the other hand,
8 if you've been to my house and seen the stairs, you
9 could probably estimate how many stairs I have based
10 on what you've seen, plus bringing in your other
11 knowledge. And that would not be a guess or
12 speculation if you remember. It would be an
13 estimate.

14 A. Yes.

15 Q. Do you agree with that?

16 A. Yes.

17 Q. Do you know if you're appearing here today to testify
18 as a corporate representative of Flagstar?

19 MR. MARIENTHAL: Object to form.

20 THE WITNESS: I am unaware of what
21 that term means.

22 BY MR. FREDMAN:

23 Q. Okay. That brings up another point. If you don't
24 know the answer to a question, please say so. If you
25 don't understand the question, please say so. You

1 did a great job of doing that.

2 Do you understand that you're here to
3 testify on behalf of Flagstar?

4 A. Yes.

5 Q. Do you understand you're here to testify on behalf of
6 Flagstar in some kind of representative capacity?

7 MR. MARIENTHAL: Object to form.

8 THE WITNESS: I'm unsure what that
9 term means.

10 BY MR. FREDMAN:

11 Q. Okay. Do you understand that you're here to testify
12 on behalf of Flagstar as an expert?

13 MR. MARIENTHAL: Object to form.

14 She's not a 30(b)(6) witness and --

15 MR. FREDMAN: I'm just asking her.

16 THE WITNESS: I do not know the
17 definition of an expert witness, so I'm
18 unable to answer that.

19 BY MR. FREDMAN:

20 Q. You understand you're here to testify about a
21 declaration you submitted in this case?

22 A. Yes.

23 Q. Do you consider yourself to be an expert in the
24 subject matter of that declaration?

25 MR. MARIENTHAL: Object to form.

1 servicing right asset.

2 BY MR. FREDMAN:

3 Q. I want to make sure I get my terminology straight. A
4 mortgage servicing right is also MSR?

5 A. Correct.

6 Q. And when you say asset, you're using singular. Are
7 you talking about many mortgage servicing right
8 assets?

9 A. Correct. When I refer to mortgage servicing right
10 asset, I'm referencing the portfolio of mortgage
11 servicing rights that make up the mortgage servicing
12 right asset on the balance sheet.

13 Q. Got it. Thank you. Mortgage servicing rights are
14 sometimes called MSRs?

15 A. Correct.

16 Q. And help me -- what is -- what piece of a loan is the
17 MSR? If you own MSR, what part of the loan do you
18 own?

19 MR. MARIENTHAL: Object to form.

20 BY MR. FREDMAN:

21 Q. You can answer that in a way you think may be using
22 better terminology.

23 A. The MSR is an asset created when the loan is sold
24 into the secondary market. The primary portion of
25 the loan is used to create a security. There's a

1 portion of the loan, the interest rate that is used
2 by the investor or guarantor, for example, Freddie,
3 Fannie, or Ginnie. And then there is a portion that
4 remains that is the income that the owner of the MSR
5 receives in order to appropriately service that
6 asset, meaning the collection of the payments, the
7 remittance of the payments to the bondholders, as
8 well as the -- all the routine servicing activities.

9 Q. Okay. I want to make sure I understand. So when
10 there's a single loan, it includes the MSR aspect and
11 sort of the beneficial ownership of the loan. Is
12 that an appropriate way of describing it?

13 A. Yes. There would be the two pieces of it. When you
14 sell it, you break it into multiple pieces. One is
15 the beneficial ownership of the loan and the other
16 would be the income received to do the actual
17 servicing activities. It is bifurcated into those
18 two pieces, and the one that is the service fee
19 creates the mortgage servicing right asset.

20 Q. Got it. And are those the only two pieces of the
21 loan that are created, or are there other pieces?

22 A. Primarily those are the only two pieces of the loan.
23 It is broken into those two pieces of the loan.

24 Q. And the owner of the MSR has the right to receive the
25 income but also has the obligation to pay most of it

1 over to the investor?

2 A. Exactly.

3 Q. And that's pursuant to a contract that's created in
4 the securitization process?

5 A. I don't know exactly where the contract is created.

6 Q. Okay.

7 A. Whether it's in the specific securitization process
8 or there's a master contract that governs all the
9 sales that happen.

10 Q. Okay. Where does Flagstar acquire its MSRs?

11 MR. MARIENTHAL: Object to form.

12 THE WITNESS: Flagstar does not
13 acquire MSRs. Flagstar only acquires
14 loans.

15 BY MR. FREDMAN:

16 Q. So Flagstar acquires loans and does that process
17 whereby it breaks off the investor piece and retains
18 the MSR piece. Is that what you're saying?

19 A. Correct.

20 Q. And it sells the investor piece to a third party?

21 A. Correct.

22 Q. Does it sometimes retain the investor piece for
23 itself?

24 A. No.

25 Q. No?

1 A. No.

2 Q. For, like, the time it owns the investor piece. But
3 its goal is to always sell the investor piece to a
4 third party?

5 A. In general, we would only bifurcate the loan into the
6 two pieces when we're selling to the investor piece.
7 Otherwise, we would retain the loan as a whole loan
8 on our balance sheet.

9 Q. Okay. Does Flagstar carry a lot of whole loans on
10 its balance sheets as long-term assets?

11 A. Flagstar does have a portfolio of held for investment
12 mortgage loans on its balance sheet.

13 Q. And in those scenarios, is Flagstar also considered
14 the MSR holder, or there's just no MSR?

15 A. There is no MSR.

16 Q. And in those scenarios, the servicing of the loan is
17 conducted by Flagstar?

18 A. Correct.

19 Q. And is it considered servicing, not subservicing,
20 right?

21 A. Correct.

22 Q. Okay. When Flagstar acquires a whole loan and breaks
23 off the investor piece, does it do that loan by loan
24 or in pools?

25 A. That is completed in pools.

1 Q. Okay. Can you tell me a little more about how that
2 is typically set up?

3 MR. MARIENTHAL: Object to form.

4 THE WITNESS: The majority of the
5 loans that Flagstar purchases are eligible
6 for delivery into Fannie, Freddie, or
7 Ginnie. Fannie, Freddie, and Ginnie have
8 specific pool criteria that are used to
9 create the pools, such as different
10 product types, a 30-year versus a 15-year.
11 And then also the primary other
12 distinction is the note rate of the loan.

13 BY MR. FREDMAN:

14 Q. And so the loans are delivered into preexisting
15 pools?

16 A. The market in general, the secondary market has
17 certain pool criteria that you deliver into, such as
18 a 30-year-fixed three coupon.

19 Q. Okay. And does that occur -- from Flagstar's point
20 of view, does that occur loan by loan, or does it
21 pool loans together before it delivers them into the
22 market?

23 A. It pools the loans together in, like, pools and
24 delivers them into the market.

25 Q. Okay. So there's been some terminology used by other

1 Flagstar witnesses and Flagstar lawyers in this case
2 that has to do with situations where Flagstar is the
3 MSR owner. Is that a different situation from when
4 Flagstar owned the whole loan?

5 MR. MARIENTHAL: Object to form.

6 THE WITNESS: In my opinion, yes,
7 because if Flagstar owns a whole loan,
8 there is not an MSR asset created.

9 BY MR. FREDMAN:

10 Q. Uh-huh.

11 A. It is a whole loan that is on Flagstar's balance
12 sheet. And yes, we provide the servicing activities
13 for that loan, but there is not a separate mortgage
14 servicing right asset.

15 Q. Okay. And that's from your position -- perspective
16 as in treasury?

17 A. Right.

18 Q. Do you know if whole loans held by Flagstar are
19 treated with respect to interest on escrow in the
20 same manner as loans where Flagstar owns the MSR?

21 A. To my knowledge, they are handled the same.

22 Q. And that's different from when a third party owns the
23 MSR, correct, in terms of interest on escrow?

24 A. If a third party owns the MSR and we are subservicing
25 on behalf of the third party, we follow their

1 requirements as servicer.

2 Q. Okay. When you say Flagstar acquires loans, does
3 it -- it acquires loans through its own originations?

4 A. Yes.

5 Q. And tell me all the way Flagstar acquires loans in
6 general.

7 A. Flagstar acquires loans through correspondent
8 relationships, broker relationships. We have a
9 retail group where we have loan officers that
10 originate loans. And we have a direct to consumer
11 group, which is very much like retail. It's just
12 they are more of a call center based.

13 Q. So those are all loans that more or less originate
14 with Flagstar money, right?

15 A. Correct.

16 Q. Does Flagstar acquire loans originated by third
17 parties?

18 A. Yes. Those would be the correspondent loans. So
19 correspondent loans are closed with other people's
20 money, and then we subsequently purchase them.

21 Q. But at the close, it's understood that Flagstar is
22 going to purchase that loan?

23 A. Yes.

24 Q. So I understand that. Is there any -- is there
25 any -- does Flagstar just go out and buy pools of

1 loans or sets of loans that -- in the secondary
2 market?

3 A. Very rarely Flagstar will purchase pools of loans for
4 some intended purchase, such as CRA.

5 Q. What's CRA?

6 A. The Community Reinvestment Act.

7 Q. Okay. Explain to me that a little more. Why would
8 Flagstar purchase loans for the CRA?

9 A. To my knowledge, the CRA requires Flagstar to have
10 loans in certain regions based on our footprint of
11 our retail banking.

12 Q. Uh-huh.

13 A. And in some cases, we do not have a strong loan
14 presence in those areas. Therefore, in order to meet
15 those requirements, we need to purchase loans in
16 those areas.

17 Q. And give me an example of what that loan purchase
18 might look like. Would you buy them from a whole
19 different bank maybe?

20 A. Yes. That would be the typical situation.

21 Q. All right. However Flagstar acquires the loans, I
22 think it almost always -- or you said sometimes it
23 retains the loans as portfolio loans.

24 A. Right.

25 Q. Most often it sells off the beneficial interest to

1 investors?

2 A. Correct.

3 Q. And in that process, it retains the MSR's, at least at
4 the point of selling off the loans to the investors;
5 is that correct?

6 A. We have two methods at this time in order to manage
7 our MSR's. We will retain the mortgage servicing
8 right for a portion of them. We also have flow sale
9 agreements in place where at the time of creation of
10 the securitization, in the bifurcation of the MSR, we
11 concurrently sell that MSR to a third party.

12 Q. And does that third party subcontract back to
13 Flagstar for subservicing?

14 MR. MARIENTHAL: Object to form.

15 THE WITNESS: In not all scenarios
16 does that happen. But in the majority of
17 our current relationships, yes.

18 BY MR. FREDMAN:

19 Q. Does Flagstar -- I think you said Flagstar never just
20 goes out and buys MSR rights exclusive once they've
21 been segregated from the beneficial interest; is that
22 correct?

23 A. Correct.

24 Q. So it only gets MSR -- MSR's from loans that it
25 somehow acquires --

1 A. Correct.

2 Q. -- as loans?

3 A. Correct.

4 Q. Thank you. And then -- but it does -- it does --
5 once it has an MSR, it sometimes sells the MSR but
6 retains the servicing as subservicing; is that
7 correct?

8 A. Correct. We will sell MSR and concurrently enter
9 into an agreement to subservice that MSR on behalf of
10 the purchaser.

11 Q. Okay. As of now with Flagstar, roughly, with
12 Flagstar's servicing and subservicing portfolio, what
13 percentage of it -- for what percentage of it does
14 Flagstar own the MSRs?

15 MR. MARIENTHAL: Object to form.

16 THE WITNESS: Can you clarify that
17 for me?

18 BY MR. FREDMAN:

19 Q. I mean, I'm taking a snapshot now of the loans that
20 Flagstar is servicing or subservicing. What
21 percentage of them are subserviced or -- let me back
22 up a little.

23 I think in Flagstar terminology, if you say
24 subservice, that means there's a third party that
25 owns the MSRs.

1 A. That is correct.

2 Q. And if you say service, that means Flagstar owns the
3 MSRs?

4 A. Correct.

5 Q. And if you say service, that could also mean that
6 Flagstar just owns the loan and, thus, the MSRs have
7 not been segregated?

8 A. Correct.

9 Q. Got it. Okay. So what percentage -- looking at
10 servicing versus subservicing, which I understand is
11 non-owned versus owned, what percentage of the loans
12 of that group is subserviced at this time?

13 A. The majority would be subserviced at this time. My
14 high level estimate would be approximately 80 percent
15 subserviced.

16 Q. 80 percent subserviced. 20 percent either Flagstar
17 is the MSR owner or Flagstar just owns the whole
18 loan?

19 A. Exactly.

20 Q. And can you break that down? Within that 20 percent,
21 what percentage would be owned loans versus MSR
22 holder?

23 A. Of the 20 percent, my estimate would be 15 percent of
24 that would be -- so breaking the 20 percent into 15
25 and 5, 15 would be MSR, 5 would be whole loan.

1 Q. Okay. That's also 75, 25?

2 A. Exactly.

3 Q. You're the treasurer. I think I got that right. And
4 15 MSR?

5 A. Correct.

6 Q. So your estimate is about 5 percent of Flagstar's --
7 if I say servicing portfolio, is that confusing,
8 because it doesn't in your mind include subservicing?

9 A. It doesn't, but if I -- I would say 5 percent of
10 Flagstar's loans serviced.

11 Q. I see. There we go. Loans -- it's all about the
12 terminology. Loans serviced.

13 So 5 percent of Flagstar's loans serviced
14 are whole loans owned by Flagstar?

15 A. Correct. That is my high level estimate.

16 Q. I understand. How many people report to you in your
17 current position?

18 A. In my current position, there are five people that
19 report to me.

20 Q. And what title level are they?

21 MR. MARIENTHAL: Object to form.

22 THE WITNESS: Their title is either
23 quantitative financial analyst or senior
24 quantitative financial analyst, and their
25 officer titles range from bank officer to

1 in this document or which sections were my
2 specific words.

3 BY MR. FREDMAN:

4 Q. You can't -- sitting here today, at least at this
5 point, you can't tell the difference between what
6 your attorneys wrote and what you may have added?

7 A. No, I am not able to provide that information.

8 Q. Okay. And let me just ask you this. As signed, it's
9 nine paragraphs. Was it nine paragraphs when you got
10 it?

11 MR. MARIENTHAL: Object to form. You
12 can answer to the extent you know.

13 THE WITNESS: If I remember
14 correctly, I do not remember how many
15 paragraphs were in the original document.

16 BY MR. FREDMAN:

17 Q. Do you remember if you deleted any paragraphs?

18 A. Yes. I believe I deleted some paragraphs that were
19 not relevant to my role.

20 Q. Okay. Do you remember if you added any paragraphs?

21 A. I do not remember if I added any specific paragraphs.

22 Q. Did you -- do you remember if you added any words?

23 A. Yes. I definitely added clarification words.

24 Q. Okay. Did you add words, like, to make things more
25 contingent, words like may or could?

1 A. Correct.

2 Q. So what category of loans are you referring to in
3 paragraph 4?

4 A. I am referring to all channels of loans. As in
5 paragraph 4 it says, loan -- mortgage loans
6 originated by other -- for mortgage loans originated
7 by other lenders and serviced by Flagstar. So that
8 would actually be the correspondents.

9 Q. It's correspondent loans?

10 A. Yeah.

11 Q. And so these are loans where they've been originated
12 through a correspondent channel. Flagstar buys them.
13 And you say pricing associated with servicing.
14 What's the pricing associated with servicing?

15 A. So part of the pricing that is provided when you
16 purchase a loan is the expectation or the value
17 associated with the MSR that will be created when
18 that loan is sold.

19 Q. Would the correspondent lender have any visibility
20 into that?

21 A. The correspondent lender would be able to see the
22 different pricing components in their rate sheet, so
23 that they could see for their specific loan they
24 would have the option of pricing for an escrowed and
25 a non-escrowed loan, for example. There's multiple

1 different pricing options they could use. But in
2 this context, they would have a price for an escrow
3 loan and a price for a non-escrow loan.

4 Q. So there might be a discount for a -- some basis
5 point discount or add-on for an escrowed or
6 non-escrowed loan. Is that what you're saying?

7 A. Yes.

8 Q. And that would appear on the pricing sheet that
9 Flagstar delivers to the correspondent?

10 A. Correct.

11 Q. And what would that percentage be?

12 MR. MARIENTHAL: Object to form.

13 THE WITNESS: I am unable to say the
14 percentage because it varies greatly based
15 on the different product. It is a large
16 rate sheet that has a wide grid that
17 factors in a bunch of different
18 components.

19 BY MR. FREDMAN:

20 Q. Okay. Are you familiar with these pricing sheets?

21 A. I do not directly generate the pricing sheets. I
22 have reviewed them, but I do not have details on all
23 aspects of the pricing sheet.

24 Q. They're generated every day, right?

25 A. Yes.

1 BY MR. FREDMAN:

2 Q. Okay. Does that fee, that .25 percent, does that in
3 any way reflect or represent the money, the pricing
4 that Flagstar paid for the inclusion of an escrow
5 account at origination?

6 MR. MARIENTHAL: Object to form.

7 THE WITNESS: Although I am not 100
8 percent certain, I believe that is
9 intended to be the estimation of the
10 difference in value between an escrowed
11 and non-escrowed account.

12 BY MR. FREDMAN:

13 Q. What's your basis for saying that?

14 A. My basis for saying that is the understanding that
15 when Flagstar attempts to price various things, it
16 utilizes analysis on the potential difference, as
17 well as industry comparisons or industry benchmarks
18 of those types of fees.

19 Q. I'm going to turn -- direct you now to look at
20 paragraph 5 of your declaration. Does paragraph 5
21 also refer only to correspondent lending channel?

22 A. Yes.

23 Q. Okay. And this one also has that -- an escrow
24 account or the authority to create an escrow account
25 is a consideration -- it has that or the authority.

1 Does that mean the same thing, as far as you're
2 concerned?

3 A. As far as I'm concerned, yes, the same thing.

4 Q. So what you're saying is that -- is the same thing
5 you said with respect to paragraph 4. If there's an
6 escrow account on the loan, there is some kind of
7 discounting, and/or if there's not an escrow account,
8 there's some kind of add-on that the correspondent
9 lender sees on their pricing sheets?

10 MR. MARIENTHAL: Object to form.

11 THE WITNESS: Correct.

12 BY MR. FREDMAN:

13 Q. Do you mean to say anything more about the
14 consideration, a consideration for Flagstar when
15 determining purchase price of the loan?

16 MR. MARIENTHAL: Object to form.

17 THE WITNESS: No, I'm not intending
18 to say anything else.

19 BY MR. FREDMAN:

20 Q. Okay. When you say purchase the servicing rights,
21 you're talking about the servicing right -- are you
22 talking about -- in a correspondent lending
23 situation, doesn't Flagstar already own the -- isn't
24 Flagstar already entitled to the whole loan by virtue
25 of the correspondent lending relationship?

1 Q. Are you referring to custodial accounts created,
2 custodial deposits created by escrow accounts?

3 MR. MARIENTHAL: Object to form.

4 THE WITNESS: Correct. The escrow
5 account is held in a custodial deposit.

6 BY MR. FREDMAN:

7 Q. And that increases Flagstar's custodial deposits?

8 MR. MARIENTHAL: Object to form.

9 THE WITNESS: Depending on the amount
10 of the escrow account, yes, it would be
11 held in custodial deposits.

12 BY MR. FREDMAN:

13 Q. Looking at paragraph 6, I'm going to read it. In
14 addition to originating and servicing the loan, a
15 mortgage loan, a critical component of Flagstar's
16 mortgage lending business is its ability to sell
17 mortgage servicing rights in the secondary market.
18 The marketability of mortgage servicing right in the
19 secondary market is critical, as Flagstar, by selling
20 mortgage servicing rights into the secondary market,
21 obtains the necessary funds needed to make additional
22 mortgage loans.

23 What's your basis for saying that?

24 A. My basis of saying that is my understanding of
25 Flagstar's balance sheet and business model and my

1 experience in working in the industry.

2 Q. Is that your opinion, based on those factors?

3 A. I believe it is more than an opinion, that it is a
4 fact that if Flagstar does not sell mortgage
5 servicing rights, there will come a time when it will
6 no longer be able to make or originate new loans.

7 Q. You say mortgage servicing rights. Does that include
8 the actual beneficial interest in the loan as well?
9 Are you attempting to distinguish the mortgage
10 servicing right from the beneficial interest in the
11 loan?

12 A. I would say it's definitely applicable to both.
13 However, in statement 6, it's identifying the
14 mortgage servicing rights.

15 Q. What percentage of the value of the loan is in the
16 mortgage servicing rights versus the investment
17 piece, the beneficial interest in the loan?

18 MR. MARIENTHAL: Object to form.

19 THE WITNESS: The vast majority of
20 the value is in the beneficial interest of
21 the loan. The value of the mortgage
22 servicing right, although varies greatly,
23 depending on different factors within the
24 loan is typically between 1 and
25 1.5 percent.

1 THE WITNESS: I am unable to
2 determine the exact factor that causes the
3 pricing disconnect.

4 BY MR. FREDMAN:

5 Q. Do you have any nonspeculative reason for the pricing
6 disconnect?

7 A. No.

8 Q. Okay. All you're saying is that sometimes when
9 Flagstar wants -- they want more money for something
10 than the other counterparty is willing to pay, right?

11 A. Correct.

12 Q. And you don't know why that is?

13 A. No.

14 Q. Okay. As long as the counterparty intended to comply
15 with California IOE law, the fact that -- California
16 IOE law would not itself be a factor. Are you trying
17 to say that -- Flagstar does not represent to
18 counterparties that they do not have to comply with
19 California IOE law, right?

20 MR. MARIENTHAL: Object to form.

21 THE WITNESS: Not to my knowledge.

22 BY MR. FREDMAN:

23 Q. Okay. That's not a material component of the
24 transaction, what you sell in MSRs, right?

25 MR. MARIENTHAL: Object to form.

1 THE WITNESS: No.

2 BY MR. FREDMAN:

3 Q. Correct. It's not? What I said is true?

4 A. Can you please repeat what you said.

5 Q. Yeah. We got in a yes-no type -- the fact that third
6 parties will intend to comply and do comply with
7 California IOE law -- can I -- let me strike that. I
8 got lost a little myself.

9 As long as a third party intended to comply
10 with California IOE law, the existence of the
11 California IOE law could not be a factor affecting,
12 impeding Flagstar's ability to sell MSRs, right?

13 MR. MARIENTHAL: Object to form.

14 THE WITNESS: Whether or not a third
15 party intends to comply with California
16 IOE is not something that factors into the
17 analysis. When I am reviewing potential
18 transactions, I am looking at the bid
19 received, and that is what I am factoring
20 into the decision on whether or not to
21 transact.

22 BY MR. FREDMAN:

23 Q. These counterparties, are they banks?

24 A. Certain transactions we complete are with banks, and
25 certain are with nonbank entities.

1 Q. Okay. Do you have any -- I know the answer. I'm not
2 going to --

3 MR. MARIENTHAL: Whenever is a good
4 time for a break, let me know.

5 MR. FREDMAN: Let me ask a couple
6 more.

7 MR. MARIENTHAL: Yeah.

8 BY MR. FREDMAN:

9 Q. So I'm going to ask this question again. I'm not
10 sure if I asked it.

11 Do you have any reason to believe that the
12 third-party purchasers' intent to comply with
13 California law regarding IOE has impeded or would
14 impede Flagstar's ability to sell MSRs on the
15 secondary market?

16 A. Can you repeat that one more time, please.

17 Q. Do you have any reason to believe that the
18 third-party purchasers' intent to comply with the
19 California law regarding IOE has impeded or would
20 impede Flagstar's ability to sell MSRs in the
21 secondary market?

22 MR. MARIENTHAL: Object to form.

23 THE WITNESS: I am unaware of the
24 third-party purchasers' intent and what
25 impact that may or may not have on a

1 transaction.

2 BY MR. FREDMAN:

3 Q. I am asking you to assume their intent to comply with
4 California law. Do you have any reason, assuming
5 that they intend to comply with California law, that
6 that California law would impede Flagstar's ability
7 to sell MSRs on the secondary market?

8 MR. MARIENTHAL: Same objection.

9 THE WITNESS: Assuming their intent
10 to comply, I am unaware of what impact
11 that would have, as I am only interested
12 in the price that they would pay. I am
13 unaware of what impact their intention to
14 comply would have on their bid.

15 BY MR. FREDMAN:

16 Q. Are you aware of any counterparties who have -- as
17 far as you know, do not believe they have to comply
18 with California IOE law?

19 A. I am unaware of the counterparties' stance on the
20 California IOE law.

21 Q. Do you understand Flagstar's basis for claiming it's
22 exempt from the California IOE law?

23 MR. MARIENTHAL: Asked and answered.

24 Go ahead and answer.

25 THE WITNESS: Flagstar is a federally

1 chartered savings bank that has federal
2 exemption over certain state laws.

3 BY MR. FREDMAN:

4 Q. And is it your understanding that's transferable to
5 counterparties in MSR transactions?

6 A. I am unaware of whether or not that's transferable.

7 MR. MARIENTHAL: Object to the form
8 of that last question.

9 BY MR. FREDMAN:

10 Q. Are any of the counterparties in MSR transactions
11 federal savings banks?

12 A. We have historically transacted with federally
13 chartered savings banks. However, not recently.

14 Q. Okay. In your statement in -- in paragraph 6 and 7,
15 are you saying that this lawsuit represents a
16 critical risk to Flagstar's lending business in so
17 far as it may require Flagstar to comply with
18 California IOE law when it services a loan that it
19 owns?

20 MR. MARIENTHAL: Object to form.

21 THE WITNESS: I'm sorry. Can you
22 repeat that?

23 MR. FREDMAN: Can you read it back?

24 (Last question read back.)

25 MR. MARIENTHAL: Same objection.

1 THE WITNESS: I am stating that in
2 the event it becomes more difficult to
3 sell mortgage servicing rights, it would
4 have a significant impact on Flagstar's
5 lending business.

6 BY MR. FREDMAN:

7 Q. Are you trying to make any conclusions about
8 California -- or compliance with California IOE law?

9 MR. MARIENTHAL: Object to form.

10 THE WITNESS: I am not trying to make
11 any connection.

12 BY MR. FREDMAN:

13 Q. Okay. No connection whatsoever, correct?

14 A. I am unaware of if there is a connection.

15 Q. Do you have any reason to believe that compliance
16 with -- Flagstar's compliance with California IOE law
17 would make it more difficult for Flagstar to sell
18 MSRs?

19 A. My understanding is that there would be a pricing
20 difference; however, I am unaware whether or not that
21 would lead to it being more difficult to sell MSRs.

22 Q. How would Flagstar's compliance with California law,
23 when it services a loan, create a pricing difference
24 when it sells MSR?

25 MR. MARIENTHAL: Object to form.

1 THE WITNESS: Correct. I am -- I do
2 not have inside knowledge as to their
3 actual practices.

4 BY MR. FREDMAN:

5 Q. Okay. But what I want to be really clear about is in
6 these paragraphs 6, 7, 8, 9 to a certain extent to
7 the extent it flows from 6, 7, 8, you're talking
8 about if a third-party purchaser has to comply with
9 state IOE laws, they might be willing to pay less for
10 MSR that Flagstar is trying to sell them, correct?

11 A. Correct.

12 Q. You're not -- you're saying nothing about the
13 requirement that Flagstar comply with state IOE laws?

14 A. Yes.

15 Q. Yes, correct?

16 A. Yes. Yes.

17 Q. Okay. And as far as you know, all third-party
18 purchasers do comply with state IOE laws, correct?

19 MR. MARIENTHAL: Object to form.

20 THE WITNESS: I do not know that for
21 a fact.

22 BY MR. FREDMAN:

23 Q. Do you have any -- you have no reason to doubt that
24 that's true?

25 A. I am unaware of the practices of all of our

1 third-party potential purchasers.

2 Q. So you have reason to believe that they don't comply
3 with the law?

4 MR. MARIENTHAL: Object to form.

5 THE WITNESS: I have no knowledge of
6 their individual situation regarding
7 compliance with the law or exemption from
8 said law.

9 BY MR. FREDMAN:

10 Q. Okay. But you know currently there's -- none of them
11 are federal savings banks, correct?

12 MR. MARIENTHAL: Object to form.

13 THE WITNESS: None of our
14 subservicing clients are federal savings
15 banks. However, people are --
16 counterparties that we have sold to have
17 been federal savings banks.

18 BY MR. FREDMAN:

19 Q. Which ones?

20 A. To my knowledge, Fifth Third, I believe, is a federal
21 savings bank. And the other banks that we have sold
22 to include Regions Bank. I'm unsure if they're
23 federally chartered or what their charter is.

24 Q. Uh-huh.

25 A. And I know that we have sold to other banks.

1 MR. MARIENTHAL: Object to form.

2 THE WITNESS: I am not stating -- in

3 this statement I am not stating that, no.

4 BY MR. FREDMAN:

5 Q. Anywhere in this declaration are you claiming that
6 state IOE laws impact Flagstar's ability to sell MSR?

7 MR. MARIENTHAL: Object to form.

8 THE WITNESS: I am not stating they
9 do impact. I am saying that they may
10 impact.

11 BY MR. FREDMAN:

12 Q. They may or they may not?

13 A. Correct.

14 Q. Well, that's speculation, isn't it? It's possible is
15 what you're saying?

16 MR. MARIENTHAL: Object to form.

17 Argumentative.

18 THE WITNESS: I am saying that I am
19 unaware of all of the factors that go into
20 the valuation that a purchaser may use.
21 However, interest on escrow does impact
22 the cost it takes to service. So that it
23 would be a likely factor that would be
24 included in the valuation.

25

1 BY MR. FREDMAN:

2 Q. On the other hand, if everybody complied with state
3 laws, the marketplace would be stable in the sense
4 that there's nobody gaining an advantage by not
5 having to comply with state laws, correct?

6 A. There would be -- it would be more aligned in that
7 there -- the majority of the assumption should be
8 more closely aligned.

9 Q. The majority of the purchasers' assumptions about the
10 costs benefit of purchasing MSRs?

11 A. The assumptions used in their valuation and,
12 therefore, their bid would theoretically be somewhat
13 aligned.

14 Q. And for most the times when Flagstar sells MSRs, it
15 retains the subservicing, right?

16 A. In recent years, the majority of transactions have
17 also had a concurrent subservicing relationship.

18 Q. So the transaction costs are the same in all those
19 transactions. It's the subservicing, because
20 Flagstar is doing the subservicing.

21 MR. MARIENTHAL: Object to form.

22 BY MR. FREDMAN:

23 Q. It's paying Flagstar to do the subservicing, right?

24 A. I'm unclear what you mean by transaction costs.

25 Q. The cost of servicing the loan is the same in all the

1 with those terms.

2 Q. Okay. But if they all -- in terms of the cost of
3 compliance with state IOE laws, if Flagstar is
4 performing that compliance, it should all be the
5 same, correct?

6 MR. MARIENTHAL: Object to form.

7 THE WITNESS: Assuming there are no
8 other requirements from the subservicing
9 counterparty.

10 BY MR. FREDMAN:

11 Q. Okay. What I said is correct, assuming that there's
12 no other tangential requirements?

13 A. Correct.

14 Q. Got it. So in paragraph 8 in the second sentence,
15 you say, requiring the payment of interest on escrow
16 in applicable states could impede the sale of
17 Flagstar's originated loans and/or mortgage servicing
18 rights on the secondary market or subject such loans
19 to a discount to reflect the risk associated with the
20 loan. That's your statement, right? Did I read it
21 more or less correctly?

22 A. Yes. That was the statement.

23 Q. So you're saying could, as if it's possible?

24 A. Correct.

25 Q. Okay. You're not saying that would happen?

1 A. Correct.

2 Q. Yeah. In fact, we know that generally companies are
3 required to comply with the law, right?

4 MR. MARIENTHAL: Object to form.

5 THE WITNESS: As stated, I am unaware
6 of each entities different requirements to
7 apply -- comply with the law.

8 BY MR. FREDMAN:

9 Q. Okay. Assuming entities are required to comply with
10 the law -- strike that.

11 So in paragraph 9, you say, additionally,
12 in the event that market participants purchase fewer
13 thrift originated loans and/or servicing rights, the
14 reduced demand could deplete Flagstar's liquidity,
15 reduce its ability to issue credit, increase its
16 exposure to the impact of interest rate fluctuations,
17 etcetera.

18 First I want to ask you, are you
19 differentiating there between thrift originated
20 versus nonthrift originated loans?

21 MR. MARIENTHAL: Object to form.

22 THE WITNESS: I am stating thrift
23 originated loans and/or servicing rights,
24 as that is what Flagstar is.
25

1 MR. MARIENTHAL: Object to form.

2 THE WITNESS: I am unaware of any way
3 that Flagstar differentiates its products
4 in the secondary market.

5 BY MR. FREDMAN:

6 Q. Certainly the fact that it's a thrift and it
7 originated loans as a thrift is not a -- is not a
8 differentiation, correct?

9 MR. MARIENTHAL: Object to form.

10 THE WITNESS: I am unaware of how
11 being a thrift would differentiate the
12 products in the secondary market.

13 BY MR. FREDMAN:

14 Q. So you're saying if -- in paragraph 9 essentially it
15 says if market participants stopped or purchased
16 fewer Flagstar loans or MSRs, that would be bad for
17 Flagstar.

18 A. Yes.

19 Q. And that's all you're saying, right?

20 MR. MARIENTHAL: Object to form.

21 THE WITNESS: I would -- I would say
22 yes, it would be bad for Flagstar. It
23 would also reduce its ability to issue
24 credit in the market, which would
25 potentially be bad for others.

1 BY MR. FREDMAN:

2 Q. Okay. Because it would -- you're saying if --
3 wouldn't competition fill in the gap? If people
4 stopped buying those from Flagstar, there would still
5 be plenty of credit issued in the market? Are you
6 assuming there isn't other parties out there willing
7 to take Flagstar's market share?

8 MR. MARIENTHAL: Object to form.

9 THE WITNESS: I am unaware if there
10 is competitors that would be able to
11 quickly fill in all of the product
12 classifications that Flagstar currently
13 offers.

14 BY MR. FREDMAN:

15 Q. Okay. In any event, paragraph 9 is a general
16 statement that has nothing to do with compliance with
17 state IOE laws, correct?

18 MR. MARIENTHAL: Object to form.

19 THE WITNESS: Paragraph 9 is a
20 statement that discusses what would be the
21 outcome if Flagstar was unable to sell
22 loans and servicing rights into the
23 secondary market.

24 BY MR. FREDMAN:

25 Q. And I think we've already -- you've already agreed

1 that Flagstar's compliance as a servicer with state
2 IOE laws would have no effect on its ability to sell
3 loans in the secondary market, right?

4 MR. MARIENTHAL: Object to form.

5 Misstates the testimony.

6 BY MR. FREDMAN:

7 Q. Do you agree with that?

8 A. I don't believe I said it would have no impact. I
9 think it's unknown whether or not what impact it
10 would have.

11 Q. Do you have any theory of why Flagstar's compliance
12 with state IOE laws as a servicer would affect
13 Flagstar's ability to sell loans as a market
14 participant?

15 A. No, I do not have a theory.

16 Q. In paragraph 8, you say further, since the
17 transaction and compliance costs for such loans would
18 increase, the loan's respective value to the
19 secondary market participants is likely to be less.
20 You're talking about the third parties' compliance
21 costs, right? The third party purchasers' compliance
22 costs.

23 A. Yes.

24 Q. And you're saying that a third party -- are you aware
25 of Flagstar's compliance costs or the cost that is

1 Q. Would you agree that the content of this declaration
2 is based on your knowledge, skill, experience,
3 training, and education as a mortgage industry
4 professional?

5 A. Yes.

6 Q. Okay. Is it based on anything else?

7 A. No.

8 MR. FREDMAN: Okay. So we're almost
9 done. We're basically done, but I need to
10 take about five minutes, ten minutes, to
11 look over stuff. If you guys want to take
12 a break, or whatever you want to do.
13 Let's call it a ten-minute break.

14 MR. MARIENTHAL: Okay.

15 (Recess taken.)

16 MR. FREDMAN: Okay. We're back on
17 the record.

18 BY MR. FREDMAN:

19 Q. I just have a few more questions for you.

20 Having gone through this declaration sort
21 of paragraph by paragraph, does that refresh your
22 recollection at all with respect to authorship of the
23 document?

24 MR. MARIENTHAL: Object to form.

25 THE WITNESS: I would say I have no

1 additional clarity on authorship of the
2 document.

3 BY MR. FREDMAN:

4 Q. You're unaware of any particular words or phrases
5 that you added to this document personally?

6 A. Correct.

7 Q. Let me -- remember to -- we're trying to get out of
8 here, but let's not talk over each other.

9 Reading the document, does that refresh
10 your recollection about particular words or phrases
11 that you added to the document that was presented to
12 you by your attorneys?

13 A. Correct.

14 Q. Okay. And it doesn't refresh your recollection about
15 areas that you deleted from the document that was
16 presented to you by your attorneys?

17 A. Correct.

18 Q. Your particular area of expertise here is this sale
19 of MSRs on the secondary market, correct?

20 A. That is one of my areas of expertise. Yes.

21 Q. Okay. Is there another area of expertise that
22 relates to the content of your declaration?

23 A. The overall management of mortgage servicing right
24 portfolio.

25 Q. Okay. Do you -- you have no nonspeculative reason to

1 believe that the -- that Flagstar's compliance with
2 state IOE laws in its servicing business would affect
3 the sale -- its sale of MSR's, correct?

4 MR. MARIENTHAL: Object to form.

5 THE WITNESS: Can you please repeat
6 that?

7 BY MR. FREDMAN:

8 Q. You have no nonspeculative reason to believe that
9 Flagstar's compliance with state IOE laws in its
10 servicing business would affect its sale of MSR's in
11 the secondary market, correct?

12 A. Correct.

13 Q. You have said that -- or I'm not going -- I'll drop
14 that. I don't want to argue about what you said.

15 If some MSR purchasers were required to
16 comply with state IOE laws and others were not
17 required to comply, the noncompliant parties might be
18 willing to pay more than the compliant parties for
19 Flagstar MSR rights, correct?

20 MR. MARIENTHAL: Object to form.

21 THE WITNESS: There may be a pricing
22 difference for MSR's, depending on the
23 purchaser's position on complying with
24 state IOE laws.
25

1 BY MR. FREDMAN:

2 Q. Right. And that pricing difference would be if the
3 purchaser complies with state IOE laws, it might be
4 willing to pay less than the purchaser who does not
5 comply with state IOE laws. That's your testimony,
6 right?

7 A. Correct.

8 Q. But you have not observed this differentiation in
9 demand among potential MSR purchasers, correct?

10 A. I am unaware of the factors that go into the demand
11 or the pricing that has been received. In recent
12 months, I have seen adequate demand for mortgage
13 servicing rights.

14 Q. To your knowledge, you have not observed any
15 differentiation in demand based on compliance or
16 noncompliance with state IOE laws among potential MSR
17 purchasers, correct?

18 A. Correct. As I do not know potential purchasers'
19 stance on compliance with IOE.

20 Q. You're not aware of any MSR owners or potential
21 purchasers, other than Flagstar, you're not aware of
22 any who claim they do not have to comply with state
23 IOE laws, correct?

24 MR. MARIENTHAL: Object to form.

25 Asked and answered.

1 THE WITNESS: I am unaware of MSR
2 owners or potential purchasers' stance on
3 their requirements to pay IOE.

4 BY MR. FREDMAN:

5 Q. Therefore, you're unaware of any who claim they don't
6 have to pay IOE, correct?

7 A. Correct.

8 Q. And you're saying I wouldn't know?

9 A. Correct.

10 Q. You're just clarifying that I don't know that, but
11 I -- I wouldn't know, right?

12 A. Correct.

13 Q. Okay. You're not aware of any analysis by Flagstar
14 of the cost of its compliance with state IOE laws
15 with respect to the loans that it services on its own
16 account, correct?

17 MR. MARIENTHAL: Object to form.

18 Asked and answered.

19 THE WITNESS: Correct. I am unaware.

20 BY MR. FREDMAN:

21 Q. When I say services on its own account, you
22 understand what I mean by that?

23 A. Correct.

24 Q. Okay. Where it owns the MSR?

25 A. Correct.

EXHIBIT 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WILLIAM KIVETT, individually,
and on behalf of others
similarly situated,

Plaintiff,

-vs- Case No. 3:18-cv-05131-WHA (DMR)

FLAGSTAR BANK, FSB, a federal
savings bank, and DOES 1-1000,
inclusive,

Defendants.

/

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THE DEPOSITION OF SEAN M. MANSELL

Taken at 8800 Wickham Road

Romulus, Michigan

Commencing at 12:21 p.m.

Wednesday, January 15, 2020

Before Trisha Cameron, RDR, RMR, CRR, RPR, CSR

1 A. I do.

2 Q. And you have to answer the questions I ask you. Do
3 you understand that?

4 A. I do.

5 Q. You understand that the transcript that the court
6 reporter is going to prepare is going to become
7 evidence in this case?

8 A. I do.

9 Q. And it could be used in court proceedings, or it
10 could be used if you are a witness at trial to --
11 well, in various ways if you're a witness at trial.
12 Do you understand that?

13 A. Understood.

14 Q. You shouldn't guess, but you must provide estimates
15 if you have information available to you. Do you
16 understand that?

17 A. Understood.

18 Q. You shouldn't guess or speculate. Speculation, I'll
19 just define it as something that -- a theory or
20 conjecture that's not based on evidence. It's just
21 something you say. You understand?

22 A. Understood.

23 Q. If you say something might be so or might not be so,
24 that's speculation or a guess. It's not -- it's just
25 a possibility. You understand that?

1 A. Understood.

2 Q. If you think an answer to a question I'm asking would
3 be speculation or a guess, you should let me know
4 that.

5 A. Understood.

6 Q. Agreed? And if there's a question I ask that you
7 don't understand, please let me know that as well.

8 A. Understood.

9 Q. Okay. And the other part of this is there's
10 attorney-client privilege that applies to your
11 conversations, your confidential communications with
12 your attorneys. I'm sure you've heard about that
13 before. You understand that?

14 A. I do.

15 Q. So just in general, my questions are not aimed at
16 your communications with your attorneys, and you can
17 exclude that, those communications from your answers.
18 So if I say has anybody ever told you X and only your
19 attorney told you that a few minutes ago, then by all
20 means you can -- you can answer nobody but my
21 attorneys or just no, not outside, you know, the
22 litigation context.

23 On the other hand, there may be times where
24 you know something but you've also discussed it with
25 your attorneys, and that's not confidential because

1 you know it. The fact that you talk about it with
2 your attorneys does not make a fact confidential. It
3 just makes those communications with your attorneys
4 confidential. Do you understand that?

5 A. I do.

6 Q. And we may get into that more over the course of this
7 deposition. Are you appearing here to testify as a
8 corporate representative?

9 A. I am not.

10 Q. Are you here to testify as an expert?

11 MR. MARIENTHAL: Object to form.

12 THE WITNESS: I do not know the
13 definition of what counsel considers to be
14 an expert.

15 BY MR. FREDMAN:

16 Q. Okay.

17 A. So I would have to defer to counsel on that
18 designation.

19 Q. Okay. In terms of the colloquial use of the term
20 expert, do you think you're here to testify as an
21 expert in, we'll say, mortgage servicing?

22 A. I believe that I am here to testify based on my
23 extensive experience.

24 Q. Okay. We'll get into that in a second. When you say
25 your extensive experience, what is your -- what areas

1 do you have extensive experience in related to
2 mortgage banking?

3 A. Loan servicing.

4 Q. Loan servicing?

5 A. Mortgage servicing.

6 Q. And that's the experience you're referring to that
7 you believe you're here to testify about?

8 A. Correct.

9 Q. And is there any particular areas within the category
10 of loan servicing that you have particular expertise
11 in?

12 A. The management over the overall operation.

13 Q. Managing loan servicing operation?

14 A. That is correct.

15 Q. Do you have particular expertise in default
16 servicing?

17 A. I have run default servicing in the past. Yes.

18 Q. How about escrow accounts?

19 A. Yes, I've -- I've had the escrow areas report to me.

20 Q. Okay.

21 A. Both currently and in the past.

22 Q. You currently have escrow reporting to you?

23 A. Yes, sir.

24 Q. Are you an expert or -- colloquially. I'm not asking
25 for you to engage in legal definitions. But are you

1 A. Yes.

2 Q. She said it doesn't really typically buy mortgages
3 from third parties, except in connection with those
4 originations, like corresponding originations.

5 A. Can you clarify? When you say mortgages, are you
6 referring to the servicing asset?

7 Q. Loans, whole loans.

8 A. I'm not for certain what Flagstar has done in the
9 past.

10 Q. Okay. If I change that to MSR or MSRs, I may have to
11 say it with the plural --

12 A. The same answer would apply. I'm not certain what
13 they have done in the time that I have been there.

14 Q. Okay. So your understanding is that -- is it your
15 understanding that Flagstar, generally speaking,
16 originates mortgages through or obtains mortgages
17 through various origination channels and then --
18 you're going to have to help me with the terminology.
19 But then strips off the MSR in the process of selling
20 the --

21 A. The loan asset.

22 Q. -- the loan asset itself?

23 A. Yes, sir.

24 Q. So you refer to sort of the beneficial right to the
25 proceeds of the loan as the loan asset?

1 A. Yes.

2 Q. And then MSR is --

3 A. The servicing asset.

4 Q. -- the servicing asset? And those are the two
5 components of the whole loan?

6 A. Yes, sir.

7 Q. And then Flagstar may sell or keep the loan asset,
8 correct?

9 A. That is correct.

10 Q. And it may sell or keep the MSR?

11 A. That is correct.

12 Q. And if it sells the MSR, it often retains the
13 subservicing; is that correct?

14 A. If it sells the MSR, there are opportunities for us
15 to sell to our clients which we already subservice
16 for. So, therefore, while the client will own the
17 MSR, we will subservice that servicing asset, that
18 loan, on their behalf.

19 Q. Okay. And Ms. Chang estimated that currently with
20 respect to Flagstar's loans serviced, 80 percent are
21 subserviced on behalf of third-party MSR holders and
22 roughly 20 percent are serviced on Flagstar's own
23 account.

24 A. That's very close. Yeah. That's correct.

25 Q. Okay. And she estimated that of that 20 percent

1 component where Flagstar is the MSR owner, about a
2 quarter of the time it owns -- it owns the whole
3 loan. So the MSR has not been segregated from the --
4 from the loan asset itself?

5 A. I would say it's slightly lower than 25 percent, but
6 roughly.

7 Q. Roughly.

8 A. I would say it would be closer to 15 to 20 percent is
9 when they would own the actual whole loan based on
10 current portfolio characteristics.

11 MR. MARIENTHAL: You probably need to
12 clarify your numbers.

13 BY MR. FREDMAN:

14 Q. That's 15 percent -- 15 to 20 percent of the
15 20 percent --

16 A. So currently we have a total portfolio of
17 approximately 1.1 million, of which -- that's units.
18 Of which approximately 175,000 make up Flagstar-owned
19 either whole loans or servicing --

20 Q. Uh-huh.

21 A. -- owned MSR. The deviation between the whole loan
22 to MSR owned would be -- I'm not certain of the exact
23 breakdown. But I would estimate it being between
24 15 and 20 percent of that 175.

25 Q. And would those statistics, I understand they're

1 comply with state law. There would need to be legal
2 interpretation of that state law. There would need
3 to be implementation into our core servicing system,
4 Black Knight MSP, to be able to effectively manage
5 that. There would also have to be protocols from a
6 QA, quality assurance, perspective to ensure that not
7 only is it being performed correctly, but the regular
8 maintenance that would need to occur based on the
9 frequency of change by state law. And then
10 subsequently, our risk areas, such as internal audit,
11 would have to accommodate for that testing now to
12 ensure that we are, in fact, accommodating that
13 appropriately. So there would be a fairly extensive
14 shift within the organization from a foundational
15 standpoint to be able to accommodate this change.

16 Q. So everything you've just described, those are costs
17 of compliance with --

18 A. Those are possible -- yeah.

19 Q. Possible costs?

20 A. Possible costs, yes.

21 Q. Okay. Now, Flagstar already complies with state IOE
22 laws with respect to the 80 percent of loans it
23 subservices on behalf of third-party MSR holders,
24 correct?

25 A. That is correct. But that is at the behest of the

1 master service agreement.

2 Q. Okay. But Flagstar already incurs those costs with
3 respect to those loans, right?

4 A. Not necessarily.

5 Q. Why not?

6 A. It would be up to those master servicers to perform
7 the QA and various forms of internal audit on their
8 side, as it is their MSR portfolio and ultimately
9 they would be held responsible for maintaining the
10 payment of the interest on escrow pursuant to state
11 regulatory guidance.

12 Q. When Flagstar subservices loans for third-party MSR
13 holders, it calculates the amount of IOE it has to
14 pay, right?

15 A. It does calculate the amount of interest based on the
16 guidance provided by the master servicer.

17 Q. Okay. And it incurs those costs, right?

18 A. When you say it incurs the costs --

19 Q. Flagstar.

20 A. No. Those costs are passed back to our clients.

21 Q. The IOE or the compliance cost?

22 A. The IOE, as well as those increased compliance costs
23 are banked into the overall pricing that we would
24 deliver to the client --

25 Q. Okay. So --

1 A. -- as a cost to service.

2 Q. So are you saying that there's elements of compliance
3 that -- with state IOE laws that Flagstar does not
4 perform for its subservice accounts?

5 A. I'm sorry. Can you rephrase?

6 Q. Are there certain elements of compliance with state
7 IOE laws that Flagstar does not currently perform for
8 its subserviced accounts?

9 A. I wouldn't be able to answer that definitively.

10 Q. You don't know?

11 A. Don't know.

12 Q. You often say that it complies with state IOE laws at
13 the request of the master service -- MSR holder,
14 right?

15 A. That is correct.

16 Q. And all the MSR holders now require it to comply with
17 state IOE laws, right?

18 A. To the best of my knowledge, correct.

19 Q. Okay. And it represents to the state IOE -- to the
20 MSR holders that it has the capacity to perform that
21 role on their behalf, correct?

22 A. Yes.

23 Q. And it does have the capacity to perform that role on
24 their behalf, correct?

25 A. Yes.

1 Q. And it does perform that role on their behalf,
2 correct?

3 A. Yes.

4 Q. And are there elements of compliance that it does not
5 perform on behalf of the MSR holder?

6 MR. MARIENTHAL: Object to form.

7 THE WITNESS: Not to my knowledge.

8 However, based on us being federally
9 exempt, we do not specifically know to the
10 level of scrutiny that our compliance
11 would perform for our asset. There is a
12 responsibility by the master servicer to
13 perform a level of due diligence and audit
14 to ensure that we, their subservicer,
15 their vendor, are performing adequately.
16 Whereas if we were to service the loan
17 ourselves, meaning we own the MSR, that
18 level of review may potentially be
19 increased comparatively to what's provided
20 today for the cost that's been negotiated
21 with the current client.

22 BY MR. FREDMAN:

23 Q. What compliance functions do you -- does Flagstar
24 require MSR holders to perform when Flagstar
25 subservices the loan? And when I say compliance

1 A. None that I've seen.

2 Q. Are you aware of any analysis by Flagstar regarding
3 the consequences of being required to comply with
4 California State IOE law?

5 A. Personally, I am unaware.

6 Q. All right. Are you aware that any has -- that any
7 such analysis has occurred anywhere in the
8 organization?

9 A. I am not aware.

10 Q. Okay. You talked about compliance costs generally.
11 You tried to identify some compliance costs. Has
12 there been any studies or analysis trying to assess
13 the marginal compliance costs that Flagstar would
14 incur if it were required to comply with California
15 State IOE law with respect to its MSR owned
16 portfolio?

17 A. None that I'm aware.

18 Q. So at this time, are you saying there is a material
19 risk to Flagstar's business that would result from
20 being required to comply with California State IOE
21 law?

22 MR. MARIENTHAL: Asked and answered.

23 THE WITNESS: I believe I said
24 potentially. Yes.

25

1 BY MR. FREDMAN:

2 Q. Potentially. But potentially means it's a
3 possibility, right?

4 MR. MARIENTHAL: Object to form.

5 THE WITNESS: That is correct. As it
6 has not happened yet, it cannot be
7 definitively measured.

8 BY MR. FREDMAN:

9 Q. Do you have any other evidence -- I mean, you can say
10 it might happen, it might not happen. Do you have
11 any evidence that brings that out of the realm of
12 conjecture, speculation?

13 A. I can go based off of my experience having worked in
14 nonbank entities that are required to adhere to state
15 regulatory requirements and the amount of work,
16 maintenance, and upkeep that's necessary to adhere to
17 those, as well as to execute against from a
18 maintenance standpoint. I can only bring my
19 experience to bear in saying that I believe that it
20 would potentially increase the risk and/or cost of
21 Flagstar if we were not to be able to -- allowed to
22 continue to fall under a federal exemption.

23 Q. Has Flagstar conducted any analysis or studies of the
24 compliance cost it currently incurs with respect to
25 the loans that it subservices on behalf of

1 third-party MSR holders?

2 A. None that I have seen.

3 Q. Have you -- did you attempt to analyze that for
4 purposes of this declaration?

5 A. Did I attempt to analyze what?

6 Q. The cost, the compliance costs that Flagstar
7 currently incurs with respect to complying with state
8 IOE laws for the -- for the subservicing portfolio.

9 MR. MARIENTHAL: Object to form.

10 THE WITNESS: The specific cost, no.

11 BY MR. FREDMAN:

12 Q. Have you done any analysis of that?

13 A. Any analysis of what specifically?

14 Q. The cost -- Flagstar's cost of complying with state
15 IOE laws for its subservicing portfolio.

16 A. I have not, no.

17 Q. Are you aware of any that's been conducted at all?

18 A. I have not seen.

19 Q. Has anybody -- other than your own statements, has
20 anybody within Flagstar told you that being required
21 to comply with state IOE laws would present a
22 material risk to Flagstar's business or operations?

23 MR. MARIENTHAL: Other than your
24 discussions with counsel.

25 THE WITNESS: Not that I can recall.

1 BY MR. FREDMAN:

2 Q. Are you relying -- have you heard any -- other than
3 advice of counsel, have you heard any executive at
4 Flagstar say that?

5 A. Not that I can recall.

6 Q. Given your role at Flagstar, would you be aware if
7 this litigation were considered a material risk to
8 Flagstar's business or operations?

9 MR. MARIENTHAL: Object to form.

10 THE WITNESS: I'm not sure I can
11 answer that.

12 BY MR. FREDMAN:

13 Q. You don't know if you would be aware or not?

14 A. I do not know.

15 Q. It could be above your pay grade? It could be
16 something you're aware of?

17 A. I don't know what I don't know.

18 Q. Okay. What executive at Flagstar would be able to
19 say if Flagstar considered this litigation or the
20 prospect of having to pay IOE on California mortgages
21 a material risk to Flagstar's banking business or
22 operation?

23 A. I would suspect that it would be our executive team,
24 which is a matter of public record, which would
25 include but not limited to our CEO and our COO.

1 Q. And --

2 A. That is my opinion.

3 Q. That's your personal opinion?

4 A. Yes, sir.

5 Q. You're not -- you're not claiming to speak for
6 Flagstar?

7 A. I am not a corporate witness.

8 Q. Okay. And that's throughout this deposition. You're
9 not the corporate witness?

10 A. That's correct.

11 Q. Okay. What I'm trying to -- these are very general
12 statements. I'm trying to siphon out what
13 specifically you're saying.

14 A. Sure.

15 Q. I understand that in the retail channel and in the
16 correspondent channel, Flagstar offers better pricing
17 for a loan that's originated with an escrow account
18 versus one that's not. Is that the basis for this
19 statement in paragraph 16?

20 A. Part of, yes.

21 Q. Okay. And are you able -- what's the basis for
22 you're saying it offers the better pricing based on
23 risk mitigation as opposed to the profit benefits
24 that Flagstar derives from escrow accounts?

25 A. It would be both, and that is based off of my

1 servicers, either through direct
2 passthroughs or through the negotiation of
3 the overall contract for pricing
4 structure, I would say that Flagstar is
5 less affected by those relationships
6 comparatively as it would be for
7 maintenancing its relatively small MSR
8 portfolio internally.

9 BY MR. FREDMAN:

10 Q. What about the MSR holders? Are they -- the
11 third-party MSR holders. Are they encouraging
12 Flagstar to stop maintaining escrows for the loans?

13 A. No. Not at this point.

14 Q. Are they small entities or large entities?

15 A. Most of our clients are fairly large.

16 Q. What are your clients?

17 A. Pardon?

18 Q. What are they?

19 A. They are anything ranging from MSR hedge funds
20 through other mortgage organizations.

21 Q. You're saying they're bigger than Flagstar?

22 A. From an MSR holding standpoint, yes.

23 Q. From a capital standpoint?

24 A. So one of the things that we need to be cognizant of
25 is that based on Tier 1 capital, Flagstar can only

1 Q. Okay. So how does Flagstar calculate the borrower's
2 relative risk in relation to an escrow account?

3 A. Pursuant to investor guidelines.

4 Q. In Flagstar originations, retail originations?

5 A. Yes. So, again, if the borrower is applying for a
6 conventional loan or if the borrower is applying for
7 an FHA loan, various loans have different
8 underwriting criteria. Borrowers may or may not
9 qualify based on that underwriting for a different
10 loan product.

11 Q. Are you saying anything more than having an escrow
12 account is a good thing?

13 MR. MARIENTHAL: Object to form.

14 THE WITNESS: I am saying that having
15 an escrow account and the ability to
16 service that escrow account is less risk
17 than having a loan that is not escrowed.

18 BY MR. FREDMAN:

19 Q. Are you saying anything more than that?

20 A. No.

21 Q. Looking at paragraph 18 -- it's a big statement. So
22 let's -- I'll read through it, and we can unpack it.

23 Without the ability to create an escrow
24 account on any particular loan or in the event escrow
25 accounts become more costly to provide to a borrower,

1 Flagstar may be forced to charge higher interest
2 rates, assess larger origination fees, or loan less
3 money to mitigate additional risk of loss, and it
4 would severely inhibit Flagstar's desire to
5 participate in originating agency loans, as such
6 loans -- such agency loans have stringent escrow
7 requirements.

8 First of all, you used the term may in the
9 first part of it. Flagstar may be forced. Are you
10 offering a specific opinion there, or just saying
11 that's something that might possibly happen?

12 MR. MARIENTHAL: Object to form.

13 THE WITNESS: As it has not happened,
14 so we can definitively say whether
15 something would or would not happen, it is
16 speculation on my part based on what a
17 potential could be.

18 BY MR. FREDMAN:

19 Q. That's all it is?

20 A. Yes, sir.

21 Q. Okay. And does that may apply to the second part
22 where it says it would severely inhibit Flagstar's
23 desire?

24 A. Yes.

25 Q. Okay. So that's, again, speculation on your part

1 about what a potential impact could be?

2 A. Correct.

3 Q. Okay. Have you done any analysis, or are you aware
4 of any analysis that supports the statement in
5 paragraph 18?

6 MR. MARIENTHAL: Object to form.

7 THE WITNESS: No.

8 BY MR. FREDMAN:

9 Q. Do you have any reason to believe that requiring
10 Flagstar to comply with California State IOE law
11 would result in Flagstar's inability to create escrow
12 accounts?

13 MR. MARIENTHAL: Object to form.

14 THE WITNESS: I believe that it is a
15 possibility.

16 BY MR. FREDMAN:

17 Q. Are you able to say anything more than that?

18 A. I'm not able to say whether it is definitive or not,
19 as it hasn't happened.

20 Q. Okay. Are you -- the possibility -- it might happen,
21 it might not happen, right?

22 A. That is true.

23 Q. In paragraph 19 -- again, I'll read it to you.

24 In other words, without the risk mitigation
25 protections offered by an escrow account, Flagstar

1 may be forced to either, one, increase the interest
2 rate associated with the loan, two, charge greater
3 loan origination fees, three, lend a smaller sum of
4 money of funds, or four, refrain from making the
5 mortgage loan. You wrote that, right?

6 A. It was a collaborative effort in which I was a part
7 of. Yes.

8 Q. Okay. And the term you all used was may again.

9 A. Yes.

10 Q. And, again, you're speculating on something that
11 might occur?

12 A. Possibility that could happen. Yes.

13 Q. Anything more than that?

14 A. No.

15 Q. Have you done any -- have you done any or are you
16 aware of any studies or analysis that support this
17 likelihood of this possibility?

18 MR. MARIENTHAL: Object to the form.

19 THE WITNESS: This is the same of the
20 previous possibility that you asked that.

21 So no.

22 BY MR. FREDMAN:

23 Q. Okay. Thank you. I'll read you paragraph 20.

24 Due to Flagstar's relatively small size in
25 the mortgage origination industry, any increase in

1 interest rates, increase in fees, or reduced loan
2 amounts could significantly impact Flagstar's ability
3 to offer and/or service competitive mortgage loan
4 products. You wrote that, right?

5 A. Collaborative effort. Yes. I was part of writing
6 it.

7 Q. Collaborative effort with your attorneys?

8 A. Yes.

9 Q. And, again, the term you all settled on was could,
10 right?

11 A. Yes.

12 Q. Again, you're referring to a speculative possibility?

13 A. That is correct.

14 Q. Okay. I'm trying to understand how the potential for
15 compliance for Flagstar in its servicing operation to
16 be required to comply with state escrow interest laws
17 would impact loan origination at all.

18 Is it your position that requiring Flagstar
19 to comply with state escrow interest laws and
20 California State IOE law in particular would affect
21 Flagstar's origination business?

22 A. What I am saying is that as with any product that is
23 offered, there is a cost that's associated with that
24 product. There's also a gain that's associated with
25 that product. If the cost is increased as such as

1 State IOE law. You don't have to agree with that.

2 But assuming that's true, is it fair to --
3 for Flagstar not to comply with California State IOE
4 law?

5 MR. MARIENTHAL: Object to form.

6 THE WITNESS: I can't base my
7 decision to your assumption that -- the
8 question that you posed, I can't base my
9 decision on what everybody else is doing.
10 Just because other participants are doing
11 it doesn't necessarily mean it's correct
12 or the correct interpretation of the law.

13 BY MR. FREDMAN:

14 Q. Assuming it's true what I said, that all the other
15 market competitors are doing it at this time, does it
16 give Flagstar a unique competitive advantage to not
17 comply with state IOE laws?

18 MR. MARIENTHAL: Object to form.

19 THE WITNESS: I'm not comfortable
20 with answering that. It's too speculative
21 in nature.

22 BY MR. FREDMAN:

23 Q. In paragraph 21 you say, if a mortgage loan did not
24 have an escrow account, Flagstar may likely
25 seek/require a premium for the loan to the

1 unmitigated risk of loss. And, again, you use the
2 word may.

3 A. Yes.

4 Q. Is this, again, speculation?

5 A. It is.

6 Q. Thank you.

7 A. It is a possibility that could exist.

8 Q. Do you agree that's speculation?

9 A. Yes.

10 Q. That's all you're trying to do right there?

11 THE WITNESS: Yes.

12 MR. MARIENTHAL: Object to form.

13 Asked and answered.

14 BY MR. FREDMAN:

15 Q. Looking at paragraph 22 -- I'll read the whole thing.
16 However, if a mortgage loan already had an escrow
17 account created at loan origination, Flagstar relies
18 on this risk mitigation protection to assess the
19 borrower's mitigated risk level. If the maintenance
20 of the escrow account would now impose a further cost
21 on Flagstar due to the payment of interest, Flagstar
22 may be forced to seek an additional premium that was
23 neither calculated or assessed at loan origination to
24 compensate for those additions costs.

25 You wrote that, correct?

1 A. In part from a collaborative effort with counsel.

2 Yes.

3 Q. And in the second paragraph, you use, again, the
4 word -- the second sentence of the paragraph, again,
5 you use the word may.

6 A. Yes.

7 Q. And, again, that means that your -- this is
8 speculation or conjecture about something that might
9 happen?

10 A. Correct.

11 Q. And what you're -- what you're saying in the second
12 sentence is -- boils down to if Flagstar had to pay
13 the cost of paying interest on escrow, then it
14 would -- might be forced to make up that cost through
15 seeking additional revenues, right?

16 A. That is correct. And that could also mean
17 approaching agencies to say that we ultimately as a
18 servicer need to get paid more.

19 Q. Due to --

20 A. To offset.

21 Q. Do agencies differentiate what they pay servicers? I
22 mean, agencies take loans from all different banks --

23 A. It depends on the deal. Yeah. It differs based on
24 the deal, the investor, the type of loan, etcetera,
25 etcetera, etcetera.

1 Q. Do you think that the agencies are currently
2 compensating Flagstar less for servicing or
3 subservicing because they know that Flagstar doesn't
4 comply with state IOE laws?

5 MR. MARIENTHAL: Object to form.

6 THE WITNESS: No.

7 BY MR. FREDMAN:

8 Q. To your knowledge, is compliance with state IOE law a
9 factor in pricing of what agencies pay for loans or
10 for servicing loans?

11 MR. MARIENTHAL: Object to form.

12 THE WITNESS: To my knowledge, no.

13 BY MR. FREDMAN:

14 Q. Paragraph 23. Flagstar has contractual
15 relationships with clients who are owners of mortgage
16 servicing rights, MSRs, where Flagstar is the
17 subservicer of a mortgage loan owned by a third-party
18 MSR owner. When Flagstar enters these contractual
19 relationships, the costs and risks associated with
20 maintaining an escrow account for a borrower are
21 priced into the terms of the contractual agreement.

22 You wrote that in collaboration with
23 counsel, right?

24 A. Yes, sir.

25 Q. And Flagstar currently pays or complies with state

1 IOE laws with respect to the loans described in this
2 paragraph, right?

3 A. Yes, sir.

4 Q. Are you simply trying to convey that the compliance
5 costs, including the IOE cost, are baked into the
6 contract?

7 A. That is correct.

8 Q. So then the next paragraph says, any increase in the
9 risk portfolio in the underlying loans or an increase
10 of the servicing and maintenance of the loans and
11 escrow accounts could cause Flagstar to seek further
12 compensation in premiums from its subservicing
13 clients. You wrote that in collaboration with
14 counsel, right?

15 A. I did.

16 Q. If Flagstar's already complying with state IOE laws
17 with respect to these loans and it's already baked
18 that compliance into its contractual relationships
19 with these subservicing clients, what are you saying
20 in this paragraph?

21 A. That overall as a servicer, subservicer, if there is
22 a loss of income in a certain segment, we would have
23 to try to make that up in another segment. So
24 theoretically speaking, if we had to increase fees
25 for our subservicing because we weren't able to hold

1 as many MSRs or we weren't, you know -- or the cost
2 to service those MSRs lowered our overall profit
3 margin, we may have to increase contractual fees
4 with those subservicing clients.

5 Q. Okay. That's the intent. The intent is to say if we
6 lose money on MSR because we're complying with state
7 IOE laws with respect to owned MSRs, then we might
8 have to try and increase prices in our other business
9 lines.

10 A. Yes.

11 Q. And I'm trying to understand the point of that
12 relative to the overall -- what we're talking about
13 here.

14 So you're saying a risk of requiring
15 Flagstar to comply with state IOE laws with respect
16 to its MSR -- its own MSRs is that it would not make
17 as much money on its own MSRs, right?

18 A. The cost would raise. And based on that analysis,
19 there may have to be adjustments in other areas of
20 the structure in order to continually maintain.

21 Q. So the costs would raise and, therefore, the profits
22 would decline on the MSR -- owned MSR side of the
23 business?

24 A. Uh-huh. Which ultimately would decrease in the
25 offerings that we make to the people that in turn

1 much from those subservicing clients, per se, because
2 we're no longer selling the MSRs to them. It's a
3 full circle.

4 So the potentiality with any business. If
5 one segment of the business is no longer profitable,
6 you may have to increase overall cost or fees with
7 remaining segments. But again --

8 Q. Okay. Okay. Looking at paragraph 24, each sentence
9 includes the word could.

10 A. Sure.

11 Q. And you put that word in there to note that it's
12 speculation about something that could happen?

13 A. That's correct.

14 Q. Okay. So given that I'm not sure how much we need to
15 get into the logic behind it -- but I do want to
16 understand it, so I'm asking you to let me try and
17 dish it out piece by piece.

18 A. Sure.

19 Q. If Flagstar is required to comply with state IOE laws
20 with respect to its owned MSR portfolio, its costs
21 will go up for that portfolio and, therefore, its
22 profits will go down for that portfolio, right?

23 That's part of what -- that's the basis of what
24 you're saying in this?

25 A. Or it may inhibit the number of loans. Because if we

1 MR. MARIENTHAL: Object to form.

2 THE WITNESS: I do not believe so.

3 BY MR. FREDMAN:

4 Q. It does the same thing for each subservicing client?

5 A. I believe that there are certain points of
6 commonality. There may be some things that each
7 master servicer may request to be performed
8 differently. What those are, I cannot attest to at
9 this time.

10 Q. You said there may be. Are you, again, just
11 speculating about something that's possible?

12 A. No. I know that there have been special projects
13 that have been requested by master servicers, such as
14 delivery of particular statements or things of that
15 nature that may not have been requested by all of
16 them. So --

17 Q. In terms of the function of accounting for and
18 paying, crediting or paying state IOE -- in terms of
19 the function of crediting or paying IOE in compliance
20 with state laws, is there any difference in how
21 Flagstar performs those functions between the various
22 subservicer clients it has at this time?

23 A. Not to my knowledge, no.

24 Q. So this paragraph 25 says that Flagstar would be
25 faced with increased transaction and compliance costs

1 associated with -- I'm going to break it down --
2 originating a loan. What would be those increased
3 compliance -- transaction and compliance costs of
4 originating a loan that would result from the finding
5 that it's not exempt from state escrow interest laws?

6 A. If I may, I might be able to simplify. What that is
7 entailing is the entire loan manufacturing process.
8 We look at the profitability model of a loan
9 manufacturing process as a whole. So if the overall
10 profitability model of the loan manufacturing process
11 is less comparatively to what it is today, then
12 that's something that potentially we would have to
13 evaluate and ultimately say what are the areas that
14 are profitable, what do we wish to continue with,
15 what do we wish to not continue with. You know,
16 there may be an area that it's reduced profitability,
17 so we have to try to make it up over here by doing
18 that. It may make us less competitive.

19 Again, from a speculation standpoint, this
20 is something that from an entire loan manufacturing
21 process, if you increase the cost that's associated
22 with it, the entire thing would have to be evaluated,
23 and potentially the entire piece of it could be
24 affected because this is based on a current model
25 that we use. And if you disrupt any segment of that

1 model, you're going to have to analyze the whole
2 model to say what are the things that are still
3 profitable, what are the things that may be less
4 profitable if not profitable at all, and reevaluate
5 the entire thing. So that's what we're looking at is
6 the entire loan manufacturing process. At the end of
7 the day, it could be less profitable based on us --
8 if we were not able to adhere to the federal
9 preemption.

10 Q. Is that -- what you've just said, is that your
11 explanation of paragraph 25 of your declaration?

12 A. Originating, purchasing, selling, and servicing, yes.
13 That is the lifecycle or manufacturing cycle, if you
14 will, of a loan.

15 Q. So is there any point in me asking you about the
16 increased transaction and compliance cost associated
17 with each of those elements?

18 A. No.

19 MR. MARIENTHAL: Object to form to
20 that last question.

21 MR. FREDMAN: Okay. You want me to
22 reask it?

23 MR. MARIENTHAL: No. It's not a
24 question for him to answer.
25

1 BY MR. FREDMAN:

2 Q. So I'm going to ask you item by item. Other than
3 what you've said already, you do not need to repeat
4 what you said, but what would be the increased
5 transaction and compliance costs associated with
6 originating a loan under that scenario described in
7 the first sentence of paragraph 25?

8 MR. MARIENTHAL: Object to form.

9 Asked and answered.

10 THE WITNESS: The purpose of 25 was
11 not to parse each individual but, again,
12 the loan manufacturing process as a whole.
13 So I would not be able to speak to
14 individual percentages of what would
15 specifically happen with originations,
16 what would specifically happen with
17 purchasing. It's all encompassing. It is
18 the loan manufacturing process.

19 BY MR. FREDMAN:

20 Q. Well, you could speak with respect to servicing
21 because you -- the increased costs would be paying
22 the IOE, right?

23 A. That would be a piece of it. Yes. But just as with
24 purchasing, it would also possibly lower the overall
25 profitability margin and what we're able to sell the

1 A. I believe it's 18 to 20, somewhere around there.

2 Q. You sure?

3 A. No, I'm not.

4 Q. Okay. So when you say compliance with each
5 respective state law, in this scenario you'd only
6 have to comply, ensure compliance with the state law
7 in states that have IOE laws, right?

8 A. That have IOE requirements. Right.

9 Q. And you don't know how many states that is?

10 A. No. I have a matrix back on my desk I could refer
11 to. But to be able to speak from memory, no.

12 Q. Is this statement based on any studies or analysis
13 that Flagstar has done about --

14 A. Just my personal experience.

15 Q. Okay. Paragraph 30. All the way down to paragraph
16 30. Paragraph 26 through 29 are just your sort of
17 recitation of the content of Mr. Kivett's loan file,
18 right?

19 A. Yes, sir.

20 Q. In Paragraph 29, you say that the interest -- his
21 interest rate was 3.649 percent, correct?

22 A. That's correct.

23 Q. And you determined that by looking at the loan file?

24 A. I did.

25 Q. And then in paragraph 30 you say that if plaintiff

1 did not obtain an escrow account with respect to his
2 loan, Flagstar may have, one, increased Plaintiff's
3 interest rate to an amount greater than 3.649
4 percent, two, charge Plaintiff a higher origination
5 fee to attempt to offset the risk of loss, or, three,
6 decided not to offer Plaintiff the \$400,610 mortgage
7 loan. You wrote that in conjunction with counsel?

8 A. I did.

9 Q. And you used the word may, again, to denote that it's
10 speculation about something that might have happened?

11 A. Correct.

12 Q. You have no way of actually knowing -- you have no
13 opinion about what likely would have happened,
14 correct?

15 MR. MARIENTHAL: Object to form.

16 THE WITNESS: I have no opinion -- I
17 have no opinion as to what likely could
18 have happened?

19 BY MR. FREDMAN:

20 Q. No. Never mind. I'll drop that.

21 The fact that you used the word may denotes
22 that it's speculation about one possibility.

23 A. Agree. It is a possibility. Those are all
24 possibilities. Yes.

25 Q. Is there any documentation in Mr. Kivett's loan file

1 A. No.

2 Q. No. You disagree with me?

3 A. No. No. I agree with you. From a qualification
4 perspective, no. But it may be a -- let me
5 rephrase.

6 It may be a requirement of a particular
7 loan product for them to have an escrow account, such
8 as the loan product he entered into.

9 Q. Right. But with respect to other loan products he
10 might have entered into if he didn't want an escrow
11 account, that's just speculating about things that
12 might have happened?

13 A. Absolutely. Yes.

14 MR. FREDMAN: We're very close to
15 being done here.

16 MR. MARIENTHAL: Can we go off for a
17 second?

18 (Recess taken.)

19 MR. FREDMAN: Back on the record.

20 BY MR. FREDMAN:

21 Q. Do you have any reason to believe that an adverse
22 result in this litigation, meaning that Flagstar had
23 to fully comply with California State IOE law, would
24 result in Flagstar ceasing to create escrow
25 accounts?

1 MR. MARIENTHAL: Object to form.

2 THE WITNESS: I believe, as I've
3 stated in the declaration, I said that it
4 is a possibility.

5 BY MR. FREDMAN:

6 Q. Well, do you have any reason to believe that it's
7 likely?

8 A. I'm not comfortable in answering that question.

9 Q. Do you have any reason to believe that it's
10 likely?

11 A. I believe that it is a possibility. Whether it's
12 likely or not, I haven't seen analysis to determine
13 one way or another.

14 Q. All right. Stepping back for a second. You're a
15 mortgage industry professional?

16 A. Sure.

17 Q. And I've represented to you that there's lots of --
18 you know, that nonbanks have never complained with --
19 have always complied with state IOE laws and created
20 escrows, right?

21 A. Uh-huh.

22 Q. And I'm telling you that all the other banks in
23 California now comply with state IOE laws. You don't
24 have to believe me, but I'm probably not lying to
25 you.

1 Do you really think it's realistic to say
2 that Flagstar would cease creating escrow accounts
3 with mortgages because it has to comply with the
4 state IOE law under the circumstances?

5 MR. MARIENTHAL: Object to form.

6 Asked and answered.

7 BY MR. FREDMAN:

8 Q. Even if speculation.

9 A. I genuinely can't answer that, as I am not the one
10 that makes the decisions as to whether we move
11 forward with a particular business practice or not,
12 based on profitability analysis.

13 Q. Okay. Do you have any reason to believe that an
14 adverse result in this litigation, meaning that
15 Flagstar had to comply with California State IOE law,
16 would likely result in any impact to Flagstar's loan
17 origination business?

18 MR. MARIENTHAL: Object to form.

19 THE WITNESS: I would use my previous
20 answer. I'm not comfortable in asking
21 that, as I'm not the one who -- who would
22 ultimately make those decisions.

23 BY MR. FREDMAN:

24 Q. You don't know?

25 A. I don't know.

1 Q. Do you have any reason to believe that an adverse
2 result in this litigation, meaning that Flagstar had
3 to fully comply with California IOE law, would likely
4 result in any impact to Flagstar's loan servicing
5 business beyond the expense of paying IOE to the
6 extent it does not already?

7 MR. MARIENTHAL: Object to form.

8 THE WITNESS: I don't know.

9 BY MR. FREDMAN:

10 Q. Do you have any reason to believe that the cost to
11 Flagstar of paying IOE to the extent it does not
12 already would materially interfere with Flagstar's
13 ability to engage in loan servicing?

14 MR. MARIENTHAL: Object to form.

15 THE WITNESS: I don't know.

16 MR. FREDMAN: Okay. I'm going to get
17 you out of here. Give me two minutes.

18 MR. MARIENTHAL: Sure.

19 (Recess taken.)

20 BY MR. FREDMAN:

21 Q. Last question. Would you -- would you agree that
22 your -- the content of your declaration, substantive
23 content of your declaration is based on the
24 specialized knowledge you obtained through your
25 experience in the mortgage industry?

1 A. Yes, sir.

2 Q. Okay. All right. I have no further questions.

3 MR. MARIENTHAL: Thank you.

4 (Deposition concluded at 4:35 p.m.)

5 * * *

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM KIVETT and BERNARD and
LISA BRAVO, individually, and on behalf
of others similarly situated,

No. C 18-05131 WHA

Plaintiffs,

v.

**AMENDED CASE MANAGEMENT
SCHEDULING ORDER**

FLAGSTAR BANK, FSB, a federal savings
bank, and DOES 1-100, inclusive,

Defendants.

A prior order (Dkt. No. 129) addressed plaintiffs' administrative motion to enlarge time and extend deadlines (Dkt. No. 127), but left open the scheduling and discovery issues pending receipt of supplemental briefing and the parties' proposed class notice and plan of distribution (Dkt. Nos. 132, 138–40). This order rules as follows:

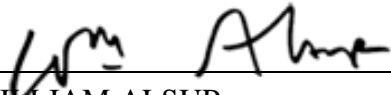
1. The Court has received the parties' stipulation for class notice and will approve it separately. By **JANUARY 9, 2020**, Flagstar shall provide the notice administrator with contact information for all class members, as the parties stipulated to (Dkt. No. 137 ¶ 3). Notice shall be distributed to the class by **JANUARY 16, 2020**, as stipulated (Dkt. No. 137 ¶ 5). Class members will have until *either* March 2, 2020, *or* 45 days from the member's receipt of the notice, whichever is later, to opt out of the class.

2. Both parties' summary judgment motions (Dkt. Nos. 122, 125) shall be heard on **JANUARY 30, 2020, at 8:00 A.M.** Flagstar has agreed to produce its employees, Courtney Chang and Sean Mansell, for deposition. Flagstar shall ensure that these depositions are conducted no later than **JANUARY 20, 2020**, unless plaintiffs agree to a later date. Plaintiffs may submit a supplemental brief no longer than six pages by **JANUARY 24, 2020, at NOON**, addressing information gleaned from these depositions only. Plaintiffs' request for permission to retain an expert to address Flagstar's preemption defense is **DENIED**. Flagstar's list of issues regarding expert testimony, served on plaintiffs on September 27, 2019, sufficiently disclosed that Flagstar intended to offer expert testimony on the "economic impact of variable state laws and regulatory schemes." This order reserves the decision on whether or not to strike the Chang and Mansell declarations until after oral argument is heard on the motions.
3. The final pretrial conference shall be held on **MARCH 4, 2020, at 2:00 P.M.**
4. The trial date will be set in March, April, or May, after the final pretrial conference in early March.

No more continuances will be allowed.

IT IS SO ORDERED.

Dated: January 6, 2020.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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*Attorneys for Plaintiffs WILLIAM KIVETT and
BERNARD and LISA BRAVO, on behalf of themselves
and the certified Class*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WILLIAM KIVETT and BERNARD and LISA
BRAVO, individually, and on behalf of others
similarly situated,

Plaintiffs,

vs.

FLAGSTAR BANK, FSB, a federal savings bank,
and DOES 1-100, inclusive,

Defendant.

No. 3:18-CV-05131-WHA (DMR)

**DECLARATION OF PETER FREDMAN
IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT
FLAGSTAR BANK, FSB'S MOTION
FOR SUMMARY JUDGMENT**

CLASS ACTION

Hearing Date: TBD¹
Time: 8:00 a.m.
Courtroom: 12, 19th Floor

Complaint Filed: August 22, 2018
FAC Filed: October 19, 2018

Honorable Judge William Alsup

¹ The hearing was initially scheduled for January 9, 2020, a date the Court was unavailable. The Court's Amended Case Management Order and Order on Plaintiffs' Motion to Enlarge Time and Extend Deadlines does not specify a hearing date for this motion. *See* Dkt. No. 129.

1 I, Peter Fredman, do hereby declare as follows:

2 1. I am an attorney duly licensed to practice before all courts of the States of California
3 and before this Court. I am co-counsel of record for Plaintiffs William Kivett, Lisa and Bernard
4 Bravo (the “Bravos”), and the certified Class (collectively “Plaintiffs”) in the above-entitled action. I
5 have personal knowledge of the matters stated herein and, if called to testify, I could and would
6 competently testify thereto.

7 2. I submit this declaration in support of Plaintiffs’ Opposition to Defendant Flagstar
8 Bank, FSB’s Motion For Summary Judgment (“MSJ”) by Defendant Flagstar Bank, FSB
9 (“Flagstar”) in this action.

10 3. In support of its MSJ, Flagstar relies exclusively on the declarations of two previously
11 undisclosed employee witnesses, Sean Mansell and Courtney Chang, in support of its assertion of the
12 existence of undisputed material facts proving its preemption defense. *See* Dkt. Nos. 125, 125-1,
13 125-2. As these witnesses are being offered as having information supporting Flagstar’s affirmative
14 defense of preemption, Flagstar was plainly obliged to timely disclose them under Rule 26 and
15 related scheduling and standing orders as detailed in the memorandum herewith.

16 4. Flagstar failed to disclose these declarants as witnesses, or to disclose any such
17 witnesses, in any of its Rule 26 disclosures, or otherwise, prior to filing its MSJ on December 5,
18 2016. Eleven days after filing the MSJ, on December 16, 2019, Flagstar served a supplemental Rule
19 26 disclosure belatedly identifying these declarants as fact witnesses. This was only after Plaintiffs
20 had filed an administrative motion seeking relief for the non-disclosure on December 12, 2019.

21 5. This was the second (and third) instance where Flagstar failed to disclose an
22 employee witness before filing that witness’s declaration in support of important briefing. In support
23 of its opposition to the motion for class certification, on August 22, 2019, Flagstar filed the
24 declaration of previously disclosed Flagstar Vice President, Mark Albers. Plaintiffs were forced to
25 obtain an extension of their reply deadline in order to obtain his deposition and incorporate it into
26 their reply briefing. *See* Dkt. Nos. 86, 88. This reduced the Court’s time to consider the papers in
27 advance of the hearing on class certification by two weeks. *See id.*

1 6. If Flagstar had timely disclosed the declarants, then Plaintiffs would have taken their
2 depositions, of course, and used the transcripts in opposition to Flagstar's MSJ. Flagstar denied
3 Plaintiffs that opportunity, however, by failing disclose these witnesses prior to filing its MSJ or the
4 close of discovery.

5 7. If Flagstar had timely disclosed these witnesses, or the defense theory (regarding the
6 alleged interference impact on Flagstar resulting from compliance with section 2954.8) that these
7 witnesses were tasked with affirming, Plaintiffs would also have retained an expert to provide
8 testimony evidencing the fact that all banks and non-bank mortgage servicers (except Flagstar with
9 respect to its portfolio of loans where it owns the mortgage servicing rights ("MSR")) now routinely
10 comply with section 2954.8(a) of the California Civil Code ("section 2954.8") with respect to all
11 loans originated after the Dodd-Frank enactment date of July 21, 2010. Because Flagstar only
12 disclosed these witnesses after the close of discovery, however, Plaintiffs are here forced to rely on
13 the undersigned's declaration as to this fact.

14 8. Specifically, since the inception of this case, the undersigned has investigated
15 compliance with section 2954.8 among bank and non-bank mortgage servicers, including (a) tracking
16 of *Lusnak* and the cases that followed *Lusnak* decision, (b) discussions with the plaintiffs' attorneys
17 in those cases, and (c) review of the mortgage servicing practices of bank and other non-bank
18 servicers through online research, review of client's and potential client's mortgage documents,
19 consultation with other attorneys in this practice area, and the like. Based on these investigations, it
20 is my knowledge and opinion that all banks and non-bank mortgage servicers now routinely comply
21 with section 2954.8 with respect to loans originated after the Dodd-Frank enactment date of July 21,
22 2010. The basis for this knowledge and opinion includes the following:

- 23 a. **Bank of America** (the *Lusnak* defendant) voluntarily began complying with section
24 2954.8 in 2019 in response to the Ninth Circuit ruling in *Lusnak*. See *Lusnak*, Case No.
25 2:14-cv-01855-GW-GJS, Dkt. No. 112-1 (12/27/2019), Class Action Settlement
26 Agreement And Release, Recitals, ¶ 5. It also agreed to pay \$35 million to settle past
27 section 2954.8 liabilities. See *id.*, ¶ 3.2.

b. **Wells Fargo** has routinely complied with section 2954.8 for quite some time. Indeed, the *Lusnak* plaintiffs alleged this fact as evidence refuting the existence of “significant interference” in that case since at least 2014. Wells Fargo’s website currently states: “We pay interest on escrow in certain states. We do this in accordance with the Real Estate Settlement Procedures Act (RESPA) and applicable state laws.”² The First Amended Complaint filed in *Lusnak* in June 2014 reports that the Wells Fargo’s website included this same content at that time.

c. **Citimortgage**, on June 18, 2019, entered into a stipulation with the California Commissioner of Business Oversight confirming that it has complied with section 2954.8 since January 1, 2019 and further agreeing to pay restitution of \$7.8 million to its California customers for its past section 2954.8 liabilities since July 1, 2014.³

a. **JPMorgan Chase Bank (“Chase”)** routinely complies with section 2954.8, except with respect to the loans involved in *McShannock v. JP Morgan Chase Bank N.A.*, 354 F. Supp. 3d 1063, 1067 (N.D. Cal. 2018), according to representations to the *McShannock* court by Chase’s counsel in that case (who are also Flagstar’s counsel here). Specifically, they represent that *McShannock* involves a distinct set of loans originated by the former Washington Mutual, FSB (“WaMu”) before Chase acquired WaMu’s assets when WaMu failed in 2008.⁴ Based on non-WaMu legacy Chase mortgage statements personally reviewed by the undersigned, it appears that Chase has generally complied with section 2954.8 for some time with respect to its other loan portfolios.

² Escrow Accounts – FAQs, WELLS FARGO, wellsfargo.com/mortgage/manage-account/escrow/faqs/ (last visited 12/29/2019).

³ Stipulation, CRMLA License No: 4131200, Dep't of Business Oversight of the State of California (June 2019), dbo.ca.gov/wp-content/uploads/sites/296/2019/06/CitiMortgage-Stipulation.pdf.

4 Thus, the question presented in *McShannock*, now on interlocutory appeal, is whether Chase, as a national bank, was and is currently entitled to rely on pre-Dodd-Frank Home Owners' Loan Act ("HOLA") field preemption with respect to loans it acquired from a federal thrift in 2008. That question, and whether Chase is ultimately required to pay IOE on these pre-Dodd-Frank loans, is obviously of no significance to the post-Dodd-Frank loans at issue in this case.

b. **Non-bank mortgage servicers**, of which there are many (including, for example, Nationstar Mortgage (now d/b/a Mr. Cooper), Fay Servicing, and Quicken), would have no basis to assert federal preemption regardless of how they acquired the servicing of the loan. Based on Plaintiffs counsel's investigations, they all appear to comply with section 2954.8.

9. Attached as **Exhibit A** is a true and correct copy of the deposition excerpts of Stephanie Ryan dated May 22, 2019.

10. Attached as **Exhibit B** is a true and correct copy of excerpts of the Defendant Flagstar Bank, FSB's Disclosure of Opposition Expert Report (the "Skanderson Report").

11. Attached as **Exhibit C** are true and correct copies of Flagstar mortgage records produced in this litigation related to the Bravos. They show that Flagstar originated the Bravos' subject mortgage loan (through a broker) on or about December 1, 2017 and required the Bravos to establish an escrow account as a condition of the loan.

12. Neither of Flagstar's Rule 30(b)(6) corporate designees, nor its retained expert, have ever suggested that Flagstar has actually experienced any type of difficulty or interference resulting from its compliance with section 2954.8 with respect to non-owned MSR loans since 2017.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on December 30, 2019, in Berkeley, California.

/s/ Peter Fredman
PETER FREDMAN

I, THOMAS LOESER, am the ECF User whose ID and password are being used to file this document hereby attest that all signatories concur with this filing. /s/Thomas Loeser

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2019, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Thomas E. Loeser
THOMAS E. LOESER

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LOWELL and GINA SMITH, husband and
Wife, and WILLIAM KIVETT, individually,
and on behalf of others similarly situated,
Plaintiff,

-vs-

No. 3:18-dv-05131-WHA (DMR)

COMPL Filed April 19, 2018

FAC Filed: Oct 19, 2018

Hon. William Alsup

FLAGSTAR BANK, FSB a federal savings
Bank, and DOES 1-1000, inclusive,
Defendant.



PAGE 1 - 95

The 30(b)(6) Deposition of - Flagstar Bank - FSB
STEPHANIE RYAN,
Taken at 3600 Center Point Parkway,
Pontiac, Michigan,
Commencing at 8:34, a.m.,
Wednesday, May 22, 2019,
Before Lucy Capobianco CSR 3061.



1 balance was last February 17th, can you determine what
2 the balance was?

3 A. Not necessarily.

4 Q. Okay. But you could pull up a record of all of the
5 transactions in and out of that escrow, correct?

6 MS. HOOVER: Objection to form.

7 A. Correct.

8 BY MR. LOESER:

9 Q. So, for example, if there was a tax payment made on a
10 certain date, you would know what the beginning balance
11 was on that date, what the payment was, and what the
12 ending balance was after that payment was made,
13 correct?

14 MS. HOOVER: Objection to form.

15 A. Correct.

16 BY MR. LOESER:

17 Q. And because there's a record like that for every
18 transaction, you could, in fact, determine what the
19 balance was on any given date simply by looking at the
20 ending balance after one transaction and the beginning
21 balance for the next transaction, and if they're the
22 same, then you would know that the balance didn't
23 change on the days in between, correct?

24 A. Correct.

25 Q. You're aware that not just California, but, in fact,



1 several states require lenders -- require lenders to
2 pay interest on escrow monies that they collect from
3 borrowers in connection with mortgage loans?

4 MS. HOOVER: Objection to form.

5 A. Yes.

6 BY MR. LOESER:

7 Q. And in California, the rule is for mortgages secured by
8 one-to-four-unit residential buildings, the mortgage
9 servicer is required to pay 2 percent annual interest
10 on escrow accounts?

11 MS. HOOVER: Objection to form.

12 A. Correct.

13 BY MR. LOESER:

14 Q. But as you mentioned, Flagstar doesn't do that, except
15 for loans with third-party MSRs, correct?

16 A. Correct.

17 Q. Do you know why that is?

18 MS. HOOVER: Just to note my objection, to
19 the extent if any of your conversations or knowledge
20 comes from conversations with counsel, either in-house
21 or outside counsel, you can't disclose those, but to
22 the extent you have knowledge within your own personal
23 knowledge or not from lawyers, you can answer the
24 question.

25 BY MR. LOESER:



1 Q. So for clarity, I'm not asking you to tell me what
2 anything is that was told to you by your counsel, but
3 to the extent you know the answer to my question,
4 simply because you spoke to counsel about it and you
5 may have covered it, doesn't change the fact that you
6 had knowledge prior to such conversations. So to the
7 extent you have knowledge independent of your
8 conversations with counsel, I would need you to answer
9 the question.

10 A. It is our bank policy that we do not pay interest on
11 escrow outside of restricted escrow.

12 Q. And you don't know the reason why the policy is what
13 the policy is?

14 A. No. No.

15 Q. So the extent of your knowledge is that you've been
16 told that this is our policy and we're not going to do
17 it, correct?

18 A. Correct.

19 MS. HOOVER: Objection to form.

20 BY MR. LOESER:

21 Q. But at the same time, you know that for some loans
22 where another entity holds the servicing rights,
23 Flagstar is acting on their behalf, as a subservicer,
24 and so they are paying the interest on escrow for those
25 accounts?



1 MS. HOOVER: Objection to form.

2 A. Correct.

3 BY MR. LOESER:

4 Q. Okay. So from at least the beginning of 2014 until
5 January 28th, 2017, Flagstar did not pay interest on
6 escrow for any of the subject loans, correct?

7 A. Correct.

8 Q. And that as we talked about, and I don't need to go
9 through each of the specific dates because we already
10 have that on the record, from the period of
11 January 28th until approximately the end of 2018,
12 Flagstar began to pay interest on escrow for
13 third-party MSRs, rolling it out on a
14 third-party-by-third-party basis, correct?

15 A. Correct.

16 Q. So, for example, on January 28th, it began paying
17 interest on escrow for third-party MSR loans held by
18 Matrix, correct?

19 A. Correct.

20 Q. And then there was a couple others that it added in in
21 Q2 of that year and some more that it added in in 2018,
22 correct?

23 A. Correct.

24 Q. Are you aware of any plans or intentions of Flagstar to
25 begin to pay interest on escrow for loans where it



1 holds the MSR's?

2 A. No.

3 Q. As between loans where a third party holds the MSR
4 rights and loans where Flagstar holds the MSR rights,
5 are there any other differences in how escrow accounts
6 are handled other than whether or not interest on
7 escrow is paid?

8 A. No.

9 Q. Now, the information systems that you have access to,
10 there is a field or a designator in there that allows
11 you to determine whether or not interest on escrow is
12 being paid on a particular escrow account, correct?

13 MS. HOOVER: Objection to form.

14 A. Correct.

15 BY MR. LOESER:

16 Q. So if someone were to come to you and say, Ms. Ryan, I
17 need to know whether or not we're paying interest on
18 escrow on a loan with the number 77472, you'd be able
19 to look in the system and say yes, it's being paid or
20 no, it's not being paid?

21 A. Correct.

22 Q. And, in fact, you would be able to look at the
23 transaction history for the escrow and determine the
24 amount of escrow that's been paid on that loan,
25 correct?



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOWELL and GINA SMITH, individually,
and on behalf of others similarly situated,

Plaintiffs,

vs.

FLAGSTAR BANK, FSB, a federal savings
bank, and DOES 1-100, inclusive,

Defendant.

CASE NO. 3:18-cv-05131-WHA

**DECLARATION OF DAVID C. POWELL
IN SUPPORT OF DEFENDANT
FLAGSTAR BANK, FSB'S RESPONSE
TO ORDER TO SHOW CAUSE WHY
DECLARATIONS OF SEAN MANSELL
AND COURTNEY CHANG SHOULD
NOT BE STRICKEN**

Complaint Filed: August 22, 2018
FAC Filed: October 19, 2018

Honorable Judge William H. Alsup

1 I, David C. Powell, declare and state as follows:

2 1. I am an attorney licensed to practice law in the state of California and am admitted
3 to practice before this Court. I am a partner with the law firm of McGuireWoods LLP, counsel of
4 record for Defendant Flagstar Bank, FSB ("Flagstar"). I am personally familiar with the legal
5 proceedings in this matter and make this declaration from my own personal knowledge, and could
6 and would competently testify to the following if called upon to do so.

7 2. I submit this declaration in support of Flagstar's response to the Court's Order to
8 Show Cause Why the Declarations of Sean Mansell and Courtney Chang should not be stricken
9 Dkt. No. 129.

10 3. On December 14, 2018, Flagstar served its initial disclosures on Plaintiff, noting that
11 among other topics, a Flagstar representative "may have discoverable information that Flagstar may
12 use to support its allegations, defenses and potential claims in this action." Attached hereto as
13 **Exhibit A** is a true and correct copy of Flagstar's Initial Disclosures.

14 4. Flagstar subsequently served supplemental disclosures on August 29, 2019 and
15 December 16, 2019. Attached hereto as **Exhibit B** are Flagstar's Second Supplemental Disclosures.

16 5. Over the course of this action, Plaintiff has served Flagstar with five sets of
17 interrogatories and three sets of requests for production. None of Plaintiff's discovery requests seek
18 information or documents supporting or related to Flagstar's preemption defense, let alone any
19 affirmative defense. Rather, Plaintiff's discovery requests sought almost exclusively class level data
20 related to escrow account balances for class members during the class period.

21 6. On March 8, 2019, Plaintiff served his Notice of Deposition on Flagstar's corporate
22 representative pursuant to Federal Rule of Civil Procedure, Rule 30(b)(6). Attached hereto as
23 **Exhibit C** is a true and correct copy of Plaintiffs' Notice of Deposition of Flagstar's Corporate
24 Representative.

25 7. Plaintiff identified eight topics, none of which relate to Flagstar's affirmative defense
26 based on HOLA preemption. After Flagstar identified two witnesses to testify on Plaintiff's
27 proposed topics, Plaintiff served his amended notice on May 7, 2019, identifying the same eight

1 topics. Attached hereto as **Exhibit D** is a true and correct copy of Plaintiffs' Amended Notice of
 2 Deposition of Flagstar's Corporate Representative.

3 8. Plaintiff proceeded to take Flagstar's depositions on May 21, 2019 and May 22,
 4 2019.

5 9. Since the depositions of Flagstar's corporate representative, Plaintiff proceeded with
 6 deposing a Flagstar employee, Mark Albers, who had personal knowledge of information in the
 7 case.

8 10. On September 27, 2019, Flagstar disclosed in its List of Issues Regarding Expert
 9 Discovery that it may offer testimony on general banking and legislative history of Federal banking
 10 charters, state and federal regulatory schemes, and economic impact of variable state laws and
 11 regulatory schemes. Plaintiff neither served discovery on this topic nor requested and discovery on
 12 Flagstar's purported expert on the issue. Attached hereto as **Exhibit E** is a true and correct copy of
 13 Flagstar's List of Issues Regarding Expert Discovery.

14 11. Until filing Flagstar's motion for summary judgment on December 5, 2019, Plaintiff
 15 had not sought a deposition of Flagstar's corporate representative on topics related to Flagstar's
 16 defenses, including its preemption defense.

17 12. In deciding to file a motion for summary judgment motion, particularly in light of
 18 receiving the Court's order on class certification, Flagstar identified corporate representatives Sean
 19 Mansell and Courtney Chang to execute declarations on behalf of Flagstar regarding preemption,
 20 and the implications of Section 2954.8 on Flagstar's business.¹ Flagstar timely served supplemental
 21 Rule 26 disclosures to identify both witnesses on December 16, 2019. *See* Ex. B.

22 I declare under penalty of perjury under the laws of the United States of America and the
 23 State of California that the foregoing is true and correct.

24 Executed at San Francisco, California, this 20th day of December, 2019.

25
 26
 27 ¹ Despite the fact that Rule 26 does not require Flagstar to identify its corporate representative witnesses by name [*See*
 28 *Moore*, 653 F.Supp. 2d 955, 959–60 (D. Ariz. 2009), on reconsideration, 2010 WL 11515202 (D. Ariz. Sept. 7, 2010)]
 Flagstar nonetheless supplemented its Rule 26 disclosures as soon as reasonably practicable and offered to produce
 them for deposition.

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By: /s/ David C. Powell
David C. Powell
Attorney for Flagstar Bank, FSB

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, a copy of the foregoing pleading, with any and all attachments, was filed electronically with the clerk of court via ECF, which will serve all counsel of record, and served via First Class Mail to any party not filing ECF, postage prepaid.

This the 20th day of December, 2019.

By: /s/ David C. Powell
David C. Powell
Attorney for Flagstar Bank, FSB

EXHIBIT A

MCGUIREWOODS LLP

David C. Powell (SBN 129781)
dpowell@mcguirewoods.com
Carolee A. Hoover (SBN 282018)
choover@mcguirewoods.com
Alicia A. Baiardo (SBN 254228)
abaiardo@mcguirewoods.com
Alexander J. Gershen (SBN 291929)
agershen@mcguirewoods.com
Two Embarcadero Center, Suite 1300
San Francisco, CA 94111-3821
Telephone: 415.844.9944
Facsimile: 415.844.9922

Attorneys for Defendant
Flagstar Bank, FSB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOWELL and GINA SMITH, individually, and
on behalf of others similarly situated,

Plaintiffs,

vs.

FLAGSTAR BANK, FSB, a federal savings
bank, and DOES 1-100, inclusive,

Defendant.

Case No. 3:18-cv-05131-WHA

**DEFENDANT FLAGSTAR BANK, FSB'S
INITIAL DISCLOSURES PURSUANT TO
F.R.C.P. RULE 26(A)(1)**

Complaint Filed: August 22, 2018
FAC Filed: October 19, 2018

Honorable Judge William H. Alsup

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, Defendant Flagstar Bank, FSB (“Flagstar”) makes the following disclosure of witnesses and documents based on the information currently and reasonably available to Flagstar. These disclosures are based upon information that is currently available to Flagstar. Flagstar reserves the right to supplement or amend these disclosures as further information becomes available. Flagstar does not, by describing documents and other information herein, waive its right to object to production or admission of such documents or information on any ground. Discovery in this case has not yet commenced and Flagstar recognizes its obligations under Fed. R. Civ. P. Rule 26(e) to amend or supplement these initial disclosures as it obtains additional discoverable information that it may use to support its allegations, claims or defenses.

These disclosures do not identify any potential experts consulted or retained by Flagstar. Nor do these disclosures identify persons or a description of documents to be used solely for impeachment purposes. Flagstar will provide expert witness disclosures consistent with Rule 26(a)(2) or as otherwise ordered by the Court. These disclosures do not constitute a waiver of any privilege or work product protection.

A. Individuals Likely To Have Discoverable Information:

The following individuals may have discoverable information that Flagstar may use to support its allegations, defenses and potential claims in this action.

1. Plaintiffs Lowell and Gina Smith

c/o Thomas E. Loeser
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Tel: (206) 623-7292

c/o Peter B. Fredman
LAW OFFICE OF PETER FREDMAN PC
125 University Ave, Suite 102
Berkeley, CA 94710
Tel: (510) 868-2626

Plaintiffs Lowell and Gina Smith have knowledge and discoverable information related to their allegations and claims, and the purported damages set forth in the First Amended Complaint

1 (“FAC”).

2 **2. Plaintiff William Kivett**

3 c/o Thomas E. Loeser
 4 HAGENS BERMAN SOBOL SHAPIRO LLP
 5 1301 Second Avenue, Suite 2000
 6 Seattle, WA 98101
 7 Tel: (206) 623-7292

8 c/o Peter B. Fredman
 9 LAW OFFICE OF PETER FREDMAN PC
 10 125 University Ave, Suite 102
 11 Berkeley, CA 94710
 12 Tel: (510) 868-2626

13 Plaintiff William Kivett has knowledge and discoverable information related to his
 14 allegations and claims, and the purported damages set forth in the First Amended Complaint
 15 (“FAC”).

16 **3. Representative(s) of Flagstar Bank, FSB**

17 c/o Dave Powell
 18 MCGUIREWOODS LLP
 19 Two Embarcadero Center, Suite 1300
 20 San Francisco, CA 94111

21 Flagstar’s representative(s) are likely to have discoverable information related to Plaintiffs
 22 Lowell and Gina Smith and William Kivett (collectively, “Plaintiffs”) claims, Flagstar’s defenses,
 23 and general knowledge regarding Plaintiff Lowell Smith’s mortgage loan in the amount of \$401,250
 24 to finance the purchase of real property located at 4291 Wilson Lane, Concord, California 94521 and
 25 Plaintiff William Kivett’s mortgage loan in the amount of \$400,610 from Flagstar to finance his
 26 purchase of real property located at 1873 Love Circle, Simi Valley, California 93063.

27 **B. Documents and Electronically Stored Information Flagstar May Use to Support**
 28 **Its Defenses**

29 The following is a description, by category, of documents, electronically stored information
 30 (“ESI”) and tangible things that are in the possession, custody, or control of Flagstar that may be
 31 used to support Flagstar’s allegations, defenses and potential claims in this action. Each document is
 32 subject to and without waiver of Flagstar’s right to object to the authenticity of, qualification or
 33 reference of any such document, or to move *in limine* to exclude such documents or portion thereof.

1 Flagstar reserves the right to amend or supplement this information if additional relevant, non-
2 privileged documents or categories of documents are located or identified.

- 3 1. Flagstar may use non-privileged documents relating to Plaintiff Lowell Smith's
4 October 27, 2004 mortgage loan, including the promissory note, deed of trust, and
5 documents and correspondences related to loan servicing.
- 6 2. Flagstar may use non-privileged, confidential documents relating to the loan file,
7 servicing records, and account statements and correspondences associated with
8 Plaintiff Lowell Smith's October 27, 2004 mortgage loan that Flagstar will produce
9 only pursuant to an appropriate protective order.
- 10 3. Flagstar may use non-privileged documents relating to Plaintiff William Kivett's
11 September 19, 2012 mortgage loan, including the promissory note, deed of trust, and
12 documents and correspondences related to loan servicing.
- 13 4. Flagstar may use non-privileged, confidential documents relating to the loan file,
14 servicing records, and account statements and correspondences associated with
15 Plaintiff William Kivett's September 19, 2012 mortgage loan that Flagstar will
16 produce only pursuant to an appropriate protective order.
- 17 5. Selected documents, ESI and tangible things identified by Plaintiffs, through initial
18 disclosures or discovery, that support Flagstar's allegations, defenses and potential
19 claims in this action.

16 C. Damages

17 As of the date of these disclosures, Flagstar claims no damages against any party to this
18 action. Therefore, no computation of damages under Rule 26(a)(1)(A)(iii) is required of Plaintiffs at
19 this time. Plaintiffs reserve the right to assert a claim or claims should it become apparent that such
20 an assertion of claims is warranted.

21 D. Insurance

22 At this time, Flagstar is not aware of any insurance agreement that would satisfy any possible
23 judgment in the action.

1 Date: December 14, 2018

Respectfully submitted,

2
3 **MCGUIREWOODS LLP**

4
5 By: /s/ David C. Powell

David C. Powell

Attorney for Defendant Flagstar Bank, FSB

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is Two Embarcadero Center, Suite 1300, San Francisco, CA 94111.

On December 14, 2018, I served the following document(s) described as

DEFENDANT FLAGSTAR BANK, FSB'S INITIAL DISCLOSURES PURSUANT TO F.R.C.P. RULE 26(A)(1)

Thomas E. Loeser
HAGENS BERMAN SOBOL SHAPIRO
LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Tel: (206) 623-7292
Email: toml@hbsslaw.com

Attorneys for Plaintiff Lowell and Gina Smith

Peter B. Fredman
Law Office of Peter Fredman
125 University Ave., Suite 102
Berkeley, CA 94710
Tel: 510-868-2626
Email: peter@peterfredmanlaw.com

☒ **BY ELECTRONIC MAIL:** by transmitting via email to the parties at the email addresses listed above.

☒ **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) served hereunder. (C.C.P. § 1013(d)(e))

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 14, 2018, at San Francisco, CA.

/s/ Josh Tabisaura
Josh Tabisaura

EXHIBIT B

MCGUIREWOODS LLP
David C. Powell (SBN 129781)
dpowell@mcguirewoods.com
Carolee A. Hoover (SBN 282018)
choover@mcguirewoods.com
Aaron R. Marienthal (SBN 273154)
amamienthal@mcguirewoods.com
Alexander J. Gershen (SBN 291929)
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Two Embarcadero Center, Suite 1300
San Francisco, CA 94111-3821
Telephone: 415.844.9944
Facsimile: 415.844.9922

Attorneys for Defendant
Flagstar Bank, FSB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOWELL and GINA SMITH, individually, and
on behalf of others similarly situated,

Plaintiffs,

vs.

FLAGSTAR BANK, FSB, a federal savings
bank, and DOES 1-100, inclusive,

Defendant.

Case No. 3:18-cv-05131-WHA

**DEFENDANT FLAGSTAR BANK,
FSB'S SUPPLEMENTAL
DISCLOSURES PURSUANT TO
F.R.C.P. RULE 26(A)(1)**

Complaint Filed: August 22, 2018
FAC Filed: October 19, 2018

Honorable Judge William H. Alsup

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, Defendant Flagstar Bank, FSB (“Flagstar”) makes the following supplemental disclosure of witnesses and documents based on the information currently and reasonably available to Flagstar. These disclosures are based upon information that is currently available to Flagstar. Flagstar reserves the right to supplement or amend these disclosures as further information becomes available. Flagstar does not, by describing documents and other information herein, waive its right to object to production or admission of such documents or information on any ground. Flagstar recognizes its obligations under Fed. R. Civ. P. Rule 26(e) to further amend or supplement these initial disclosures as it obtains additional discoverable information that it may use to support its allegations, claims or defenses.

These disclosures do not identify any experts consulted or retained by Flagstar. Nor do these disclosures identify persons or a description of documents to be used solely for impeachment purposes. Flagstar will provide expert witness disclosures consistent with Rule 26(a)(2) or as otherwise ordered by the Court. These disclosures do not constitute a waiver of any privilege or work product protection.

A. Individuals Likely To Have Discoverable Information:

The following individuals may have discoverable information that Flagstar may use to support its allegations, defenses and potential claims in this action.

1. Plaintiffs Lowell and Gina Smith

c/o Thomas E. Loeser
HAGENS BERMAN SOBOL SHAPIRO LLP

1301 Second Avenue, Suite 2000

Seattle, WA 98101

Tel: (206) 623-7292

c/o Peter B. Fredman
LAW OFFICE OF PETER FREDMAN PC
125 University Ave, Suite 102
Berkeley, CA 94710
Tel: (510) 868-2626

Plaintiffs Lowell and Gina Smith have knowledge and discoverable information related to their allegations and claims, and the purported damages set forth in the First Amended Complaint (“FAC”).

2. Plaintiff William Kivett

c/o Thomas E. Loeser
HAGENS BERMAN SOBOL SHAPIRO LLP

1301 Second Avenue, Suite 2000

Seattle, WA 98101

Tel: (206) 623-7292

c/o Peter B. Fredman
LAW OFFICE OF PETER FREDMAN PC
125 University Ave, Suite 102
Berkeley, CA 94710
Tel: (510) 868-2626

Plaintiff William Kivett has knowledge and discoverable information related to his allegations and claims, and the purported damages set forth in the First Amended Complaint (“FAC”).

3. Representative(s) of Flagstar Bank, FSB

c/o Dave Powell
MCGUIREWOODS LLP
Two Embarcadero Center, Suite 1300
San Francisco, CA 94111

Flagstar’s representative(s) are likely to have discoverable information related to Plaintiffs Lowell and Gina Smith and William Kivett (collectively, “Plaintiffs”) claims, Flagstar’s defenses, and general knowledge regarding Plaintiff Lowell Smith’s mortgage loan in the amount of \$401,250 to finance the purchase of real property located at 4291 Wilson Lane, Concord, California 94521 and Plaintiff William Kivett’s mortgage loan in the amount of \$400,610 from Flagstar to finance his purchase of real property located at 1873 Love Circle, Simi Valley, California 93063.

SUPPLEMENTAL RESPONSE: Individuals Likely To Have Discoverable Information:

In addition to the individuals identified in Flagstar’s initial disclosures, which it served on Plaintiff on December 14, 2018 (“Flagstar’s Initial Disclosures”), the following individuals may

1 have discoverable information that Flagstar may use to support its allegations, defenses and
2 potential claims in this action.

3
4 **4. Proposed Plaintiffs Bernard and Lisa Bravo**

c/o Thomas E. Loeser
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Tel: (206) 623-7292

c/o Peter B. Fredman
LAW OFFICE OF PETER FREDMAN PC
125 University Ave, Suite 102
Berkeley, CA 94710
Tel: (510) 868-2626

10 Proposed class representatives Bernard and Lisa Bravo (the “Bravos”) may have knowledge
11 and discoverable information related to their allegations and claims, and the purported damages set
12 forth in the First Amended Complaint (“FAC”).

13
14 **5. Representative(s) of Flagstar Bank, FSB**

c/o Dave Powell
MCGUIREWOODS LLP
Two Embarcadero Center, Suite 1300
San Francisco, CA 94111

17 In addition to the topics identified in Flagstar’s Initial Disclosures, Flagstar’s
18 representative(s) are likely to have discoverable information related to the Bravos’ potential claims,
19 Flagstar’s defenses, and general knowledge regarding the origination and servicing of the Bravos
20 mortgage loan. Flagstar’s representative(s) are also likely to have discoverable information
21 regarding Flagstar’s general account servicing, escrow accruals and distributions, policies and
22 procedures regarding loan servicing and interest on escrow, and interest on escrow accrual
23 information. Flagstar’s representative(s) are also likely to have discoverable information related
24 to the proposed class population, including but not limited to, the servicing history for each class
25 member, which includes default rates, charge-offs, paid off loans, loans in foreclosures, loans that
26 received a modification or forbearance agreements, bankruptcy history, servicing history, identify
27 of the ownership of mortgage servicing rights (“MSR”), and the number of loans that received
28 interest on escrow during the purported class period.

SECOND SUPPLEMENTAL RESPONSE: Individuals Likely To Have Discoverable

Information:

In addition to the individuals identified in Flagstar’s initial disclosures, which it served on Plaintiff on December 14, 2018 (“Flagstar’s Initial Disclosures”), and its supplemental disclosures served on August 29, 2019 (“Supplemental Disclosures”), the following individuals may have discoverable information that Flagstar may use to support its allegations, defenses and potential claims in this action.

6. Representative(s) of Flagstar Bank, FSB, including Sean Mansell and Courtney Chang

c/o Dave Powell
MCGUIREWOODS LLP
Two Embarcadero Center, Suite 1300
San Francisco, CA 94111

In addition to the topics identified in Flagstar’s Initial Disclosures and Supplemental Disclosures, Flagstar’s representative(s), including Sean Mansell and Courtney Chang, are likely to have discoverable information related to Flagstar’s defenses, including its defense that California Civil Code Section 2954.8 is preempted by the Home Owners’ Loan Act (“HOLA”) and it’s implementing regulations. Specifically, Flagstar’s representative(s) are likely to have discoverable information related to the impacts of escrow accounts on Flagstar’s business, including Flagstar’s authority to create escrow accounts at loan origination and loan servicing, whether and how Flagstar utilizes escrow accounts to reduce the risk associated with a mortgage loan, and whether and how Flagstar relies on the risk mitigation protections offered by an escrow account during loan servicing. The Flagstar representative(s) are likely to have discoverable information related to how an escrow account factors into the pricing associated with servicing a mortgage loan and selling mortgage servicing rights into the secondary market to investors. The Flagstar representative(s) are likely to have discoverable information related to Flagstar’s mortgage origination and servicing volume in the U.S. and California, along with other statistics about loan origination, servicing, and escrow accounts for mortgage customers. The Flagstar representative(s) are likely to have discoverable information related to Plaintiff’s escrow account and the impact that the escrow account had or could have had on his interest rate, borrowing costs, and risk exposure.

1 **7. Representative(s) of Flagstar Bank, FSB, including Mark Albers and David**
 2 **Fecht**

3 c/o Dave Powell
 4 MCGUIREWOODS LLP
 Two Embarcadero Center, Suite 1300
 San Francisco, CA 94111

5 In addition to the topics identified in Flagstar’s Initial Disclosures and Supplemental
 6 Disclosures, Flagstar’s representative(s), including Mark Albers and David Fecht, are likely to have
 7 discoverable information related to the Plaintiff’s claims, Flagstar’s defenses, and Flagstar’s
 8 general account servicing, escrow accruals and distributions, policies and procedures regarding
 9 loan servicing and interest on escrow, and interest on escrow accrual information. Flagstar’s
 10 representative(s) are also likely to have discoverable information related to the proposed class
 11 population, including but not limited to, the servicing history for each class member, which includes
 12 default rates, charge-offs, paid off loans, loans in foreclosures, loans that received a modification
 13 or forbearance agreements, bankruptcy history, servicing history, identify of the ownership of
 14 mortgage servicing rights (“MSR”), and the number of loans that received interest on escrow during
 15 the purported class period.

16 **B. Documents and Electronically Stored Information Flagstar May Use to**
 17 **Support Its Defenses**

18 The following is a description, by category, of documents, electronically stored information
 19 (“ESI”) and tangible things that are in the possession, custody, or control of Flagstar that may be
 20 used to support Flagstar’s allegations, defenses and potential claims in this action. Each document
 21 is subject to and without waiver of Flagstar’s right to object to the authenticity of, qualification or
 22 reference of any such document, or to move *in limine* to exclude such documents or portion thereof.
 23 Flagstar reserves the right to amend or supplement this information if additional relevant, non-
 24 privileged documents or categories of documents are located or identified.

- 25 1. Flagstar may use non-privileged documents relating to Plaintiff Lowell Smith’s
- 26 October 27, 2004 mortgage loan, including the promissory note, deed of trust, and
- 27 documents and correspondences related to loan servicing.
- 28 2. Flagstar may use non-privileged, confidential documents relating to the loan file,
- servicing records, and account statements and correspondences associated with

Plaintiff Lowell Smith's October 27, 2004 mortgage loan that Flagstar will produce only pursuant to an appropriate protective order.

3. Flagstar may use non-privileged documents relating to Plaintiff William Kivett's September 19, 2012 mortgage loan, including the promissory note, deed of trust, and documents and correspondences related to loan servicing.
4. Flagstar may use non-privileged, confidential documents relating to the loan file, servicing records, and account statements and correspondences associated with Plaintiff William Kivett's September 19, 2012 mortgage loan that Flagstar will produce only pursuant to an appropriate protective order.
5. Selected documents, ESI and tangible things identified by Plaintiffs, through initial disclosures or discovery, that support Flagstar's allegations, defenses and potential claims in this action.

SUPPLEMENTAL RESPONSE: Documents and Electronically Stored Information Flagstar May Use to Support Its Defenses

In addition to the documents and electronically stored information identified in Flagstar's Initial Disclosures, the following is a description, by category, of documents, electronically stored information ("ESI") and tangible things that are in the possession, custody, or control of Flagstar that may be used to support Flagstar's allegations, defenses and potential claims in this action. Each document is subject to and without waiver of Flagstar's right to object to the authenticity of, qualification or reference of any such document, or to move *in limine* to exclude such documents or portion thereof. Flagstar reserves the right to amend or supplement this information if additional relevant, non-privileged documents or categories of documents are located or identified.

6. Flagstar may use non-privileged documents relating to the Bravos' December 1, 2017 mortgage loan, including the promissory note, deed of trust, and documents and correspondences related to loan servicing.
7. Flagstar may use non-privileged, confidential documents relating to the loan file, servicing records, and account statements and correspondences associated with the Bravos' December 1, 2017 mortgage loan that Flagstar will produce pursuant to an appropriate protective order.

Selected documents, ESI and tangible things identified by Plaintiffs, through initial disclosures or discovery, that support Flagstar's allegations, defenses and potential claims in this action, including but not limited to data regarding the putative class population of loans secured by a one to four unit property in California, serviced by Flagstar from January 1, 2014 to April 30, 2019, which were

1 originated and/or serviced after July 21, 2010, where Flagstar did not pay interest to the borrower
 2 on the amounts held in escrow accounts for taxes and assessment, which includes data pertaining
 3 to: (1) the total number of loans, (2) the date of loan origination, (3) the identity of the owner of the
 4 loan's MSR rights, (4) the monthly and daily escrow account balances, and (5) other data related
 5 to these loans, including default rates, charge-offs, paid off loans, loans in foreclosures, loans that
 6 received a modification or forbearance agreements, bankruptcy history, servicing history, identify
 7 of the ownership of MSRs, and the number of loans that received interest on escrow during the
 8 purported class period, as set forth in the declaration of Mark Albers submitted in support of
 9 Flagstar's Opposition to Plaintiff's Motion for Class Certification on August 22, 2019.

10 **SECOND SUPPLEMENTAL RESPONSE: Documents and Electronically Stored**
 11 **Information Flagstar May Use to Support Its Defenses**

12 In addition to the documents and electronically stored information identified in Flagstar's
 13 Initial Disclosures and Supplemental Disclosures, the following is a description, by category, of
 14 documents, electronically stored information ("ESI") and tangible things that are in the possession,
 15 custody, or control of Flagstar that may be used to support Flagstar's allegations, defenses and
 16 potential claims in this action. Each document is subject to and without waiver of Flagstar's right
 17 to object to the authenticity of, qualification or reference of any such document, or to move *in*
 18 *limine* to exclude such documents or portion thereof. Flagstar reserves the right to amend or
 19 supplement this information if additional relevant, non-privileged documents or categories of
 20 documents are located or identified.

- 21 8. Flagstar may use non-privileged documents relating to Flagstar's authority to
 22 create escrow accounts at loan origination and servicing, the financial and
 23 economic impact of escrow accounts, the effect escrow accounts have on pricing a
 24 mortgage loan and assessing risk of loss, the effect that interest on escrow laws
 25 have on Flagstar's pricing decisions and ability to contract with MSR owner
 26 clients or sell mortgage servicing rights.

27 **C. Damages**

28 As of the date of these disclosures, Flagstar claims no damages against any party to this
 action. Therefore, no computation of damages under Rule 26(a)(1)(A)(iii) is required of Plaintiffs

1 at this time. Plaintiffs reserve the right to assert a claim or claims should it become apparent that
2 such an assertion of claims is warranted.

3 **D. Insurance**

4 At this time, Flagstar is not aware of any insurance agreement that would satisfy any
5 possible judgment in the action.

6
7
8 Date: December 16, 2019

Respectfully submitted,

9
10 **MCGUIREWOODS LLP**

11 

12 By: _____

13 David C. Powell
14 Attorney for Flagstar Bank, FSB
15
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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is Two Embarcadero Center, Suite 1300, San Francisco, CA 94111.

On December 16, 2019, I served the following document(s) described as

**DEFENDANT FLAGSTAR BANK, FSB'S SUPPLEMENTAL DISCLOSURES
PURSUANT TO F.R.C.P. RULE 26(A)(1)**

on the interested parties in this action as follows:

Thomas E. Loeser
HAGENS BERMAN SOBOL SHAPIRO
LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Tel: (206) 623-7292
Email: toml@hbsslaw.com

Attorneys for Plaintiff Lowell and Gina Smith

Peter B. Fredman
LAW OFFICE OF PETER FREDMAN PC
2550 Ninth Street, Suite 111
Berkeley, CA 94710
Tel: (510) 868-2626
Fax: (510) 868-2627
Email: peter@peterfredmanlaw.com

☒ **BY ELECTRONIC MAIL:** by transmitting via email to the parties at the email addresses listed above.

☒ **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) served hereunder. (C.C.P. § 1013(d)(e))

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 16, 2019, at San Francisco, CA.


Josh Tabisaura

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Attorneys for Defendant
Flagstar Bank, FSB

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

LOWELL and GINA SMITH, individually, and
on behalf of others similarly situated,

Plaintiffs,

vs.

FLAGSTAR BANK, FSB, a federal savings
bank, and DOES 1-100, inclusive,

Defendant.

Case No. 3:18-cv-05131-WHA

**DECLARATION OF
COURTNEY E CHANG
IN SUPPORT OF DEFENDANT
FLAGSTAR BANK, FSB'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Complaint Filed: August 22, 2018
FAC Filed: October 19, 2018

Honorable Judge William H. Alsup

DECLARATION

I, Courtney E Chang declare as follows:

1. I am employed by Flagstar Bank, FSB ("Flagstar") as an Assistant Treasurer. In my capacity as Assistant Treasurer, I assist with Flagstar's practice of selling mortgage servicing rights into the secondary market. In making this declaration, I relied upon records that were made by Flagstar in the regular course of business at or near the time of the act, condition, or event reflected in the records.

2. The records that I relied upon were prepared in a manner so as to assure the trustworthiness of the records, and the accuracy of the matters related therein. I am familiar with and have access to the electronic systems of record that Flagstar uses to create and record information related to the sale of mortgage servicing rights into secondary markets. Much of the information stored in Flagstar's electronic systems is captured automatically at or about the time of the events recorded. All of Flagstar's computerized records are created and maintained in the regular course of its business, and Flagstar relies on those records in the ordinary course to conduct its business. I also have personal knowledge of and familiarity with Flagstar's business practices, including the manner in which it sells mortgage servicing rights into secondary markets.

3. The facts set forth herein are of my own personal knowledge and business records of Flagstar, and if called upon as a witness, I could and would testify competently to such facts. I submit this declaration in support of Flagstar's opposition to Plaintiff's motion for partial summary judgment as to Plaintiff's First Amended Complaint ("FAC"). I am over 18 years of age.

Whether or Not a Loan Has an Escrow Account

Factors Into the Pricing Associated With Servicing the Loan

4. For mortgage loans originated by other lenders and serviced by Flagstar, Flagstar calculates the pricing associated with servicing the loan based upon whether the loan has, or authorizes, an escrow account.

1 5. An escrow account, or the authority to create an escrow account, is a consideration
2 for Flagstar when determining whether to purchase the servicing rights for a mortgage loan.

3
4 **As a Critical Component to Flagstar's Business, Flagstar Sells Mortgage Servicing Rights**
5 **into the Secondary Market to Investors and Whether Or Not a Loan Has An Escrow**
6 **Account Factors Into the Pricing**

7
8 6. In addition to originating and servicing a mortgage loan, a critical component of
9 Flagstar's mortgage lending business is its ability to sell mortgage servicing rights on the secondary
10 market. The marketability of a mortgage servicing right in the secondary market is critical, as
11 Flagstar, by selling mortgage servicing rights into the secondary market, obtains the necessary funds
12 needed to make additional mortgage loans.

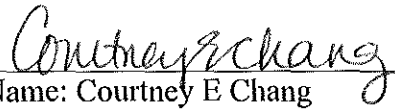
13 7. If mortgage servicing rights could not be resold on the market, or the ability to do
14 so was restricted, Flagstar would be required to vastly reduce the amount of credit available to
15 extend and increase the costs associated with borrower.

16 8. Further, since the transaction and compliance costs for such loans would increase,
17 the loan's respective value to secondary market participants is likely to be less due to the additional
18 costs and risks they carry. As a result, requiring the payment of interest on escrow in applicable
19 states could impede the sale of Flagstar's originated loans and/or mortgage servicing rights on the
20 secondary market or subject such loans to a discount to reflect the risk associated with the loan.

21 9. Additionally, in the event that market participants purchase fewer thrift-originated
22 loans and/or servicing rights, the reduced demand could deplete Flagstar's liquidity, reduce its
23 ability to issue credit, and increase its exposure to the impact of interest rate fluctuations, all of
24 which could significantly impact Flagstar's ability to compete in the mortgage industry and provide
25 borrowers with competitive mortgage loan products.

26 I declare under penalty of perjury under the laws of the United States and the State of
27 California that the foregoing is true and correct.

1 Executed on December 17, 2019 in Oakland County, Michigan.

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3 
4 Name: Courtney E Chang
5 Title: Assistant Treasurer
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Flagstar Bank, FSB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LOWELL and GINA SMITH, individually, and
on behalf of others similarly situated,

Plaintiffs,

vs.

FLAGSTAR BANK, FSB, a federal savings
bank, and DOES 1-100, inclusive,

Defendant.

Case No. 3:18-cv-05131-WHA

**DECLARATION OF SEAN MANSELL
IN SUPPORT OF DEFENDANT
FLAGSTAR BANK, FSB'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Complaint Filed: August 22, 2018

FAC Filed: October 19, 2018

Honorable Judge William H. Alsup

DECLARATION

I, Sean Mansell declare as follows:

1. I am employed by Flagstar Bank, FSB ("Flagstar") as Director of Servicing Loan Administration. In my capacity as Director of Servicing Loan Administration, I am personally familiar with certain record keeping practices of Flagstar, including those for mortgage accounts and mortgage servicing. In making this declaration, I relied upon records that were made by Flagstar in the regular course of business at or near the time of the act, condition, or event reflected in the records. Such records include, but are not necessarily limited to, Flagstar's loan origination and loan servicing files. I have personal knowledge of Flagstar's recordkeeping system, including their procedures for creating and maintaining these records.

2. The records that I relied upon were prepared in a manner so as to assure the trustworthiness of the records, and the accuracy of the matters related therein. I am familiar with and have access to the electronic systems of record that Flagstar uses to create and record information related to customer accounts. Much of the information stored in Flagstar's electronic systems is captured automatically at or about the time of the events recorded. Information that is not automatically captured electronically by Flagstar's electronic systems is entered manually by Flagstar's employees at or about the time of the events recorded, who have personal knowledge of that information. All of Flagstar's computerized records are created and maintained in the regular course of its business, and Flagstar relies on those records in the ordinary course to conduct its business. I also have personal knowledge of and familiarity with Flagstar's business practices, including the manner in which it originates, purchases, services, and sell mortgage loans.

3. All of the records referred to below and attached to this declaration are public documents and/or records maintained by Flagstar for originating and servicing of a loan made to William Kivett ("Plaintiff"). I have examined each of these documents and know them to be from Flagstar's system of record or Flagstar's loan file for Plaintiff and are the type of records that are normally maintained and kept by Flagstar in the normal course of business with respect to its servicing of loans.

1
2 4. The facts set forth herein are of my own personal knowledge and business records
3 of Flagstar, and if called upon as a witness, I could and would testify competently to such facts. I
4 submit this declaration in support of Flagstar's opposition to Plaintiff's motion for partial summary
5 judgment as to Plaintiff's First Amended Complaint ("FAC"). I am over 18 years of age.

6 **As a Federal Thrift, Flagstar Originates, Purchases, Sells, and Services Mortgage Loans**

7 5. Founded in 1987, Flagstar is a federally chartered savings bank.

8 6. Flagstar is subject to federal regulation and oversight by the Office of the
9 Comptroller of the Currency ("OCC"). Flagstar is also subject to regulation and examination by the
10 Federal Deposit Insurance Corporation and the supervision of the Consumer Financial Protection
11 Bureau. As a federal thrift, Flagstar relies in large part on preemption determinations made by the
12 OCC to determine whether it must comply with various state laws, including California Civil Code
13 § 2954.8.

14 7. Flagstar, through its own loan officers in 24 states and a wholesale network of
15 brokers and correspondents, originate, purchase, sell and service mortgages in all 50 states.

16 8. As of 2018, Flagstar originated approximately [REDACTED] in loans, including
17 approximately [REDACTED] in California, consisting of approximately [REDACTED] loans originated in
18 California.

19 9. As of 2018, Flagstar serviced or subserviced [REDACTED] loans, including [REDACTED] in
20 California. As of 2018, servicing revenue makes up approximately [REDACTED] percent of Flagstar's total
21 revenue and contributed to approximately [REDACTED] in custodial deposits.

22 **Flagstar Has Authority to Create Escrow Accounts for the Benefit of the Borrowers at**
23 **Origination and During Loan Servicing**

24 10. In originating mortgage loans, Flagstar is authorized, and sometimes required, to
25 provide its borrowers with escrow services, including the establishment of an escrow account to
26 collect money from borrowers in advance of their respective tax and insurance bills.

27 11. Flagstar also retains authority to create escrow accounts on its own discretion in
28 some instances. All loans made by Flagstar allow it authority to provide for escrow accounts under

1 various circumstances, including upon a borrower's default or their failure to make any payment to
2 a tax entity or insurance company.

3 12. Of the total loans originated by or through Flagstar in 2018, approximately [REDACTED]
4 have, or have had an associated escrow account.

5 13. Escrow accounts are maintained by Flagstar for the benefit of the borrower by
6 relieving them of the obligation to manage the payment of property taxes and insurance premiums.

7 **At Loan Origination, Escrow Accounts Are Used To Reduce the Risk Associated With**
8 **Potential Property Loss, Tax Liens, Default, And Foreclosure, Thereby Reducing a**
9 **Borrower's Interest Rate and Reducing the Costs Associated with Lending**

10 14. Flagstar uses escrow accounts to ensure that necessary funds are available to pay
11 taxes and insurance premiums. This reduces the risk of loss to the property securing the mortgage
12 loan from a tax liens, foreclosure, property damage, and loan default. An escrow account affects
13 the payment a borrower must pay each month to ensure that the borrower does not default on the
14 loan.

15 15. By proving the necessary funds to pay for taxes and insurance, an escrow account
16 reduces the risk associated with the loan. The escrow account provides stability to a borrower,
17 reduces their risk of default, and reduces the risk of foreclosure due to failure to pay property taxes
18 and/or property loss due to failure to pay insurance premiums.

19 16. At loan origination, Flagstar relies on escrow accounts to reduce the risk levels
20 associated with an individual borrower. An escrow account thereby allows Flagstar, in some
21 instances, to offer lower interest rates and extend more credit to its borrowers.

22 17. During the underwriting and origination of a mortgage loan, Flagstar calculates the
23 borrower's relative risk levels in part based on Flagstar's understanding of the risk reduction
24 provided by an escrow account and the costs associated with providing an escrow account.

25 18. Without the ability to create an escrow account on any particular loan, or in the event
26 escrow accounts become more costly to provide to a borrower, Flagstar may be forced to charge
27 higher interest rates, assess larger origination fees, or loan less money, to mitigate the additional
28 risk of loss, and it would severely inhibit Flagstar's desire to participate in originating agency loans,

1 as such agency loans have stringent escrow requirements.

2 19. In other words, without the risk mitigation protections offered by an escrow account,
3 Flagstar may be forced to either (1) increase the interest rate associated with the loan; (2) charge
4 greater loan origination fees; (3) lend a smaller sum of funds; or (4) refrain from making the
5 mortgage loan.

6 20. Due to Flagstar's relatively small size in the mortgage origination industry, any
7 increase in interest rates, increase in fees, or reduced loan amounts could significantly impact
8 Flagstar's ability to offer and/or service competitive mortgage loan products.

9 **During Loan Servicing, Flagstar Relies on the**
10 **Risk Mitigation Protections Offered by an Escrow Account**

11 21. If a mortgage loan did not have an escrow account, Flagstar may likely seek/require
12 a premium for the loan due to the unmitigated risk of loss.

13 22. However, if a mortgage loan already had an escrow account created at loan
14 origination, Flagstar relies on this risk mitigation protection to assess the borrower's mitigated risk
15 level. If the maintenance of the escrow account would now impose a further cost on Flagstar (due
16 to the payment of interest), Flagstar may be forced to seek an additional premium that was neither
17 calculated or assessed at loan origination to compensate for those additional costs.

18 23. Flagstar has contractual relationships with clients who are owners of mortgage
19 servicing rights (MSRs), where Flagstar is the servicer of a mortgage loan owned by the third-
20 party MSR owner. When Flagstar enters these contractual relationships, the costs and risks
21 associated with maintaining an escrow account for the borrower are priced into the terms of the
22 contractual agreements.

23 24. Any increase in the risk portfolio of the underlying loans or an increase of the
24 servicing and maintenance of the loans and escrow accounts could cause Flagstar to seek further
25 compensation and premiums from its subservicing clients. Due to the limited number of these
26 contractual subservicing relationships, any adverse change in contractual terms and pricing could
27 have a significant negative impact to Flagstar's mortgage servicing revenue, including the
28 discontinuation of existing agreements with third party MSR owners and a decreased ability to

1 compete with other mortgage loan servicers for new subservicing clients.

2 25. If Flagstar could not exercise its preemption rights with respect to state laws
3 requiring the payment of interest on funds held in escrow, Flagstar would be faced with an increased
4 transaction and compliance cost associated with originating, purchasing, selling, and servicing a
5 loan. Flagstar would be forced to provide extensive monetary investment in operations, regulatory,
6 compliance, legal, and accounting departments to ensure compliance with each respective state or
7 local law.

8 **Plaintiff's Escrow Account Lowered His Interest Rate, Borrowing Costs, and Risk Exposure**

9 26. On September 19, 2012, William Kivett executed a promissory note reflecting a
10 \$400,610.00 mortgage loan (the "Loan") secured by a deed of trust on property located at 1873
11 Love Circle, Simi Valley, California 93063 and recorded in the Ventura County Clerk and
12 Recorder's Office on September 28, 2012 as Document No. 20120928-00173292-0 (the "Deed of
13 Trust"). The Deed of Trust was executed by Plaintiff. A true and correct copy of the Note and the
14 Deed of Trust are attached hereto as **Exhibit A** (Note) and **Exhibit B** (Deed of Trust), respectively.

15 27. Under Uniform Covenants, paragraph 2, the Deed of Trust provides for the lender's
16 establishment of an escrow account for the payment of property taxes and insurance premiums and
17 other potential charges related to the property in accordance with RESPA.

18 28. Flagstar, pursuant to the Uniform Covenants contained in the Deed of Trust,
19 established an escrow account for the payment Plaintiff's property taxes and insurance premiums
20 and other potential charges related to the property.

21 29. According to the terms of the Deed of Trust and Note, and having mitigated the risk
22 of loss to the Loan through an escrow account, Flagstar charged Plaintiff a 3.649% interest rate on
23 his Loan.

24 30. If Plaintiff did not obtain an escrow account with respect to his Loan, Flagstar may
25 have (1) increased Plaintiff's interest rate to an amount greater than 3.649%; (2) charged Plaintiff
26 a higher origination fee to attempt to offset the risk of loss; or (3) decided not to offer Plaintiff the
27 \$400,610.00 mortgage loan.

28 I declare under penalty of perjury under the laws of the United States and the State of

1 California that the foregoing is true and correct.

2 Executed on December 17th, 2019 in Oakland County, Michigan.

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5 Name: Sean Mansell

6 Title: Director of Servicing Loan Administration
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM KIVETT, individually, and on
behalf of others similarly situated,

Plaintiffs,

v.

FLAGSTAR BANK, FSB, a federal savings
bank, and DOES 1–100, inclusive,

Defendants.

No. C 18-05131 WHA

**AMENDED CASE
MANAGEMENT ORDER AND
ORDER ON PLAINTIFFS’
MOTION TO ENLARGE TIME
AND EXTEND DEADLINES**

In this class action, plaintiffs move to enlarge time and extend deadlines (Dkt. No. 127). Flagstar did not respond. Plaintiffs contend that Flagstar relied on declarations of its employees that were never disclosed to plaintiffs in support of its motion for summary judgment and well after the close of discovery.

By **FRIDAY, DECEMBER 20**, at **NOON**, Flagstar shall show cause why the declarations of Sean Mansell and Courtney Chang should not be stricken for failure to comply with the initial disclosure requirements of Rule 26 and/or to timely seek to supplement their initial disclosure.

Pending further order of the court, plaintiffs’ response to Flagstar’s motion for summary judgment is postponed to **DECEMBER 30**. Flagstar’s response to plaintiffs’ motion for partial summary judgment is due on the established schedule.

Replies in support of both sides motions for summary judgment are postponed to **JANUARY 6**, pending further order.

The parties are reminded that by **JANUARY 2, 2020**, they shall submit a proposed form of notice to the class with a plan of distribution by first-class mail. In light of plaintiffs' briefing on the one-way intervention issue, the judge is inclined to order the following:

The approved form of notice shall be distributed no later than January 16, 2020. Class members will have until *either* March 2, 2020, *or* 45 days from receipt of the notice, whichever is later, to opt out of the class. Should plaintiffs prevail on their motion for partial summary judgment, judgment will be issued March 2. To ensure all class members are bound by the judgment, defendant is encouraged to work diligently with plaintiffs' counsel to ensure timely and effective notice is given.

With their proposed form of notice, both sides shall submit limited briefing, no longer than five pages, responding to this proposed course of action. The parties shall also address, with supporting authorities, the following two questions:

- (1) Does Rule 23(c)(2) require the opt-out period to run before granting *partial* summary judgment in favor of a class, as here, rather than judgment fully resolving the case?
- (2) Does Rule 23(c)(2) require the opt-out period to run before ruling on Flagstar's motion for summary judgment?

All other dates remain unchanged, pending further order of the court.

IT IS SO ORDERED.

Dated: December 18, 2019.



WILLIAM ALSOP
UNITED STATES DISTRICT JUDGE

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12 peter@peterfredmanlaw.com

13 *Attorneys for Plaintiff's WILLIAM KIVETT and*
14 *BERNARD and LISA BRAVO, on behalf of themselves*
15 *and the certified Class*

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 WILLIAM KIVETT and BERNARD and LISA
20 BRAVO, individually, and on behalf of others
21 similarly situated,

22 Plaintiffs,

23 vs.

24 FLAGSTAR BANK, FSB, a federal savings bank,
25 and DOES 1-100, inclusive,

26 Defendant.

No. 3:18-CV-05131-WHA

**DECLARATION OF THOMAS E.
LOESER IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

CLASS ACTION

Hearing Date: January 9, 2020
Time: 8:00 a.m.
Courtroom: 12, 19th Floor

Complaint Filed: August 22, 2018
FAC Filed: October 19, 2018

Honorable Judge William Alsup

I, Thomas E. Loeser, do hereby declare as follows:

1. I am an attorney duly licensed to practice before all courts of the States of California and Washington and before this Court. I am co-counsel of record for Plaintiffs William Kivett, Lisa and Bernard Bravo, and the putative class (collectively “Plaintiffs”) in the above-entitled action. I have personal knowledge of the matters stated herein and, if called to testify, I could and would competently testify thereto.

2. I submit this declaration in support of Plaintiff’s Notice of Motion and Memorandum in Support of Motion for Partial Summary Judgment in the above entitled action (the “motion”).

3. Attached as **Exhibit A** is a true and correct copy of the deposition excerpts of Stephanie Ryan dated May 22, 2019.

4. Attached as **Exhibit B** is a true and correct copy of the deposition excerpts of David Fetch dated May 21, 2019.

5. Plaintiffs met and conferred with Defendant regarding the one-way intervention rule, and requested that it waive the rule here, but Defendant has declined to do so.

I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct and that this Declaration was executed on December 5, 2019, in Seattle, Washington.

/s/ Thomas E. Loeser
THOMAS E. LOESER

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2019, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Thomas E. Loeser
THOMAS E. LOESER

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LOWELL and GINA SMITH, husband and
Wife, and WILLIAM KIVETT, individually,
and on behalf of others similarly situated,
Plaintiff,

-vs-

No. 3:18-dv-05131-WHA (DMR)

COMPL Filed April 19, 2018

FAC Filed: Oct 19, 2018

Hon. William Alsup

FLAGSTAR BANK, FSB a federal savings
Bank, and DOES 1-1000, inclusive,
Defendant.



PAGE 1 - 95

The 30(b)(6) Deposition of - Flagstar Bank - FSB
STEPHANIE RYAN,
Taken at 3600 Center Point Parkway,
Pontiac, Michigan,
Commencing at 8:34, a.m.,
Wednesday, May 22, 2019,
Before Lucy Capobianco CSR 3061.



1 balance was last February 17th, can you determine what
2 the balance was?

3 A. Not necessarily.

4 Q. Okay. But you could pull up a record of all of the
5 transactions in and out of that escrow, correct?

6 MS. HOOVER: Objection to form.

7 A. Correct.

8 BY MR. LOESER:

9 Q. So, for example, if there was a tax payment made on a
10 certain date, you would know what the beginning balance
11 was on that date, what the payment was, and what the
12 ending balance was after that payment was made,
13 correct?

14 MS. HOOVER: Objection to form.

15 A. Correct.

16 BY MR. LOESER:

17 Q. And because there's a record like that for every
18 transaction, you could, in fact, determine what the
19 balance was on any given date simply by looking at the
20 ending balance after one transaction and the beginning
21 balance for the next transaction, and if they're the
22 same, then you would know that the balance didn't
23 change on the days in between, correct?

24 A. Correct.

25 Q. You're aware that not just California, but, in fact,



1 several states require lenders -- require lenders to
2 pay interest on escrow monies that they collect from
3 borrowers in connection with mortgage loans?

4 MS. HOOVER: Objection to form.

5 A. Yes.

6 BY MR. LOESER:

7 Q. And in California, the rule is for mortgages secured by
8 one-to-four-unit residential buildings, the mortgage
9 servicer is required to pay 2 percent annual interest
10 on escrow accounts?

11 MS. HOOVER: Objection to form.

12 A. Correct.

13 BY MR. LOESER:

14 Q. But as you mentioned, Flagstar doesn't do that, except
15 for loans with third-party MSRs, correct?

16 A. Correct.

17 Q. Do you know why that is?

18 MS. HOOVER: Just to note my objection, to
19 the extent if any of your conversations or knowledge
20 comes from conversations with counsel, either in-house
21 or outside counsel, you can't disclose those, but to
22 the extent you have knowledge within your own personal
23 knowledge or not from lawyers, you can answer the
24 question.

25 BY MR. LOESER:



1 Q. So for clarity, I'm not asking you to tell me what
2 anything is that was told to you by your counsel, but
3 to the extent you know the answer to my question,
4 simply because you spoke to counsel about it and you
5 may have covered it, doesn't change the fact that you
6 had knowledge prior to such conversations. So to the
7 extent you have knowledge independent of your
8 conversations with counsel, I would need you to answer
9 the question.

10 A. It is our bank policy that we do not pay interest on
11 escrow outside of restricted escrow.

12 Q. And you don't know the reason why the policy is what
13 the policy is?

14 A. No. No.

15 Q. So the extent of your knowledge is that you've been
16 told that this is our policy and we're not going to do
17 it, correct?

18 A. Correct.

19 MS. HOOVER: Objection to form.

20 BY MR. LOESER:

21 Q. But at the same time, you know that for some loans
22 where another entity holds the servicing rights,
23 Flagstar is acting on their behalf, as a subservicer,
24 and so they are paying the interest on escrow for those
25 accounts?



1 MS. HOOVER: Objection to form.

2 A. Correct.

3 BY MR. LOESER:

4 Q. Okay. So from at least the beginning of 2014 until
5 January 28th, 2017, Flagstar did not pay interest on
6 escrow for any of the subject loans, correct?

7 A. Correct.

8 Q. And that as we talked about, and I don't need to go
9 through each of the specific dates because we already
10 have that on the record, from the period of
11 January 28th until approximately the end of 2018,
12 Flagstar began to pay interest on escrow for
13 third-party MSRs, rolling it out on a
14 third-party-by-third-party basis, correct?

15 A. Correct.

16 Q. So, for example, on January 28th, it began paying
17 interest on escrow for third-party MSR loans held by
18 Matrix, correct?

19 A. Correct.

20 Q. And then there was a couple others that it added in in
21 Q2 of that year and some more that it added in in 2018,
22 correct?

23 A. Correct.

24 Q. Are you aware of any plans or intentions of Flagstar to
25 begin to pay interest on escrow for loans where it



1 holds the MSR's?

2 A. No.

3 Q. As between loans where a third party holds the MSR
4 rights and loans where Flagstar holds the MSR rights,
5 are there any other differences in how escrow accounts
6 are handled other than whether or not interest on
7 escrow is paid?

8 A. No.

9 Q. Now, the information systems that you have access to,
10 there is a field or a designator in there that allows
11 you to determine whether or not interest on escrow is
12 being paid on a particular escrow account, correct?

13 MS. HOOVER: Objection to form.

14 A. Correct.

15 BY MR. LOESER:

16 Q. So if someone were to come to you and say, Ms. Ryan, I
17 need to know whether or not we're paying interest on
18 escrow on a loan with the number 77472, you'd be able
19 to look in the system and say yes, it's being paid or
20 no, it's not being paid?

21 A. Correct.

22 Q. And, in fact, you would be able to look at the
23 transaction history for the escrow and determine the
24 amount of escrow that's been paid on that loan,
25 correct?

